

5-12-2014

## State v. Riendeau Clerk's Record Dckt. 41982

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO	)	
Plaintiff/Respondent	)	SUPREME COURT NUMBER
	)	41982
	)	
vs.	)	
	)	
JESSE CARL RIENDEAU	)	
<u>Defendant/Appellant</u>	)	

CLERK'S RECORD

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI  
THE HONORABLE JOHN STEGNER, DISTRICT JUDGE  
FIRST JUDICIAL DISTRICT, PRESIDING

JAY LOGSDON  
PUBLIC DEFENDER  
PO BOX 9000  
COEUR D'ALENE ID 83816

LAWRENCE G WASDEN  
ATTORNEY GENERAL  
STATE OF IDAHO  
STATEHOUSE  
BOISE ID 83720

State of Idaho vs. Jesse Carl Riendeau

Date	Code	User		Judge
3/21/2013	NCRM	SANCHEZ	New Case Filed - Misdemeanor BAC (.175/.181)	To Be Assigned
	ADFS	SANCHEZ	Advisory Form & Notice Of Suspension	To Be Assigned
	AFPC	SANCHEZ	Affidavit Of Probable Cause	To Be Assigned
	ORPC	SANCHEZ	Order Finding Probable Cause	Clark A. Peterson
3/22/2013	BNDS	SANCHEZ	Bond Posted - Surety (Amount 500.00 )	To Be Assigned
	NODF	SANCHEZ	Notice To Defendant	To Be Assigned
	HRSC	SANCHEZ	Hearing Scheduled (Pre-Trial Conference/Arraignment 04/08/2013 08:30 AM)	To Be Assigned
		SANCHEZ	Notice of Pretrial Conference	To Be Assigned
4/8/2013	STDR	POOLE	Statement Of Defendant's Rights-DUI	Robert Caldwell
	ARRN	POOLE	Hearing result for Pre-Trial Conference/Arraignment scheduled on 04/08/2013 08:30 AM: Arraignment / First Appearance	Robert Caldwell
	ORPD	POOLE	Defendant: Riendeau, Jesse Carl Order Appointing Public Defender Public defender Public Defender	Robert Caldwell
	PLEA	POOLE	A Plea is entered for charge: - NG (I18-8004 {M} Driving Under the Influence)	Robert Caldwell
4/10/2013	ADMR	HOFFMAN	Administrative assignment of Judge	Barry E. Watson
	HRSC	HOFFMAN	Hearing Scheduled (Pre-Trial Conference 05/10/2013 10:30 AM)	Barry E. Watson
	HRSC	HOFFMAN	Hearing Scheduled (Jury Trial Scheduled 05/20/2013 08:30 AM) 5/20-5/24	Barry E. Watson
		HOFFMAN	Notice of Pre-Trial Conference and Trial	Barry E. Watson
	STRS	HOFFMAN	Speedy Trial Limit Satisfied	Barry E. Watson
4/15/2013	NANG	POOLE	Notice of Appearance, Plea of Not Guilty & Demand For Jury Trial	Barry E. Watson
	DRQD	POOLE	Defendant's Request For Discovery	Barry E. Watson
	DSRQ	POOLE	Defendant's Supplemental Req. For Discovery	Barry E. Watson
4/17/2013	PRQI	MCCANDLESS	Plaintiff's Request for Discovery & Demand For Written Notice of Intent to Offer Defense of Alibi	Barry E. Watson
	PRSD	MCCANDLESS	Plaintiff's Response To Discovery	Barry E. Watson
	DSRQ	MCCANDLESS	Response to Defendant's Supplemental Req. For Discovery	Barry E. Watson
4/19/2013	DRSD	MCCANDLESS	Defendant's Response To Discovery	Barry E. Watson
4/23/2013	MEMS	MCCANDLESS	Memorandum In Support Of Motion to Suppress Results of Breath Test	Barry E. Watson
	MNSP	MCCANDLESS	Motion To Suppress Results of Breath Test	Barry E. Watson
4/29/2013		ALBERS	AMENDED Notice of Hearing	Barry E. Watson

State of Idaho vs. Jesse Carl Riendeau

Date	Code	User	Judge
4/29/2013	HRSC	ALBERS	Hearing Scheduled (Motion to Suppress/Limine 05/10/2013 02:30 PM) & PTC
	CONT	ALBERS	Hearing result for Pre-Trial Conference scheduled on 05/10/2013 10:30 AM: Continued - AMENDED TIME 2:30 P.M.
4/30/2013	NOTH	MCCANDLESS	Notice Of Hearing
5/1/2013	MNSP	MCCANDLESS	Motion To Suppress
5/3/2013	NOTH	MCCANDLESS	Notice Of Hearing
	MEMS	MCCANDLESS	Amended Memorandum In Support Of Motion to Suppress Results of Breath Test
5/6/2013	MISC	MCCANDLESS	Supplemental Material for Defendant's Motion in Limine and Motion for Judicial Notice
	MNLI	MCCANDLESS	Motion In Limine
5/8/2013	NOHG	POOLE	Notice Of Hearing
5/9/2013	SRES	MCCANDLESS	Supplemental to Plaintiff's Response to Discovery
5/10/2013	HRHD	ALBERS	Hearing result for Motion to Suppress/Limine scheduled on 05/10/2013 02:30 PM: Hearing Held & PTC (15min)
5/20/2013	HRSC	ALBERS	Hearing Scheduled (Jury Trial Scheduled 07/01/2013 08:30 AM)
	HRSC	ALBERS	Hearing Scheduled (Pre-Trial Conference 06/21/2013 01:00 PM)
	CONT	ALBERS	Hearing result for Jury Trial Scheduled scheduled on 05/20/2013 08:30 AM: Continued 5/20-5/24
5/22/2013	HRSC	ALBERS	Hearing Scheduled (Motion to Suppress/Limine 05/24/2013 11:00 AM) Argument
		ALBERS	Notice of Hearing
5/24/2013	HRHD	ALBERS	Hearing result for Motion to Suppress/Limine scheduled on 05/24/2013 11:00 AM: Hearing Held Argument
5/28/2013	MOTN	MCCANDLESS	Motion Ex Parte Judge and Hearing on Ex parte Applications
6/10/2013	NOTH	MCCANDLESS	Notice Of Hearing
6/20/2013	ORDR	ALBERS	Order Denying Defendant's Motion to suppress for Illegal Stop and Detention, Motion to Suppress Breath Results a Nonconsensual , and Motion in Limine for inadequate SOPs
6/21/2013	ARPG	POOLE	Acknowledgement Of Rights & Plea Of Guilty
	HRHD	POOLE	Hearing result for Pre-Trial Conference scheduled on 06/21/2013 01:00 PM: Hearing Held
6/24/2013	HRVC	POOLE	Hearing result for Jury Trial Scheduled scheduled on 07/01/2013 08:30 AM: Hearing Vacated



State of Idaho vs. Jesse Carl Riendeau

Date	Code	User	Judge
6/24/2013	HRSC	POOLE	Hearing Scheduled (Sentencing 08/08/2013 01:30 PM) Plea
		POOLE	Notice of Hearing
8/1/2013	MOTN	LUCKEY	Motion To Stay Sentence
8/8/2013	DPHR	ALBERS	Hearing result for Sentencing scheduled on 08/08/2013 01:30 PM: Disposition With Hearing Plea
	STDR	ALBERS	Statement Of Defendant's Rights -DUI
	MISC	ALBERS	Rule 11 Conditional Plea
	ORDR	ALBERS	Order (Allowing conditional Plea)
	EVAL	ALBERS	Evaluation - Legacy House
			Document sealed
	PLEA	HODGE	A Plea is entered for charge: - GT (I18-8004 {M} Driving Under the Influence)
	SNPF	HODGE	Sentenced To Pay Fine (I18-8004 {M} Driving Under the Influence)
	SNIC	HODGE	Sentenced To Incarceration (I18-8004 {M} Driving Under the Influence) Confinement terms: Jail: 180 days. Suspended jail: 176 days. Credited time: 1 day.
	PROB	HODGE	Probation Ordered (I18-8004 {M} Driving Under the Influence) Probation term: 2 years 0 months 0 days. (Unsupervised)
	STAT	HODGE	Case status changed: closed pending clerk action
	BNDE	HODGE	Surety Bond Exonerated (Amount 500.00)
	JDMT	HODGE	Judgment
8/16/2013	APDC	OREILLY	Appeal Filed In District Court
8/19/2013	ADMR	OREILLY	Administrative assignment of Judge
	ESTI	CAMPBELL	Estimate Of Transcript Costs (Exempt)
8/22/2013	ORDR	ALBERS	Order Partially Staying Imposition of Sentence (Re: Jail )
8/26/2013		BERRY	Notice of Payment Sent
9/24/2013	NLTR	CAMPBELL	Notice of Lodging Transcript - Motio Hearings
	LODG	CAMPBELL	Lodged - Transcript - Motion Hearings
	RECT	CARROLL	Receipt Of Transcript - Motion Hearing - CDA PA
9/25/2013	RECT	LUCKEY	Receipt Of Transcript
10/1/2013	CERC	STHOMAS	Certificate Of Completion Relapse Education
			Document sealed
	CERC	STHOMAS	Certificate Of Completion Victims Panel
			Document sealed
10/15/2013	BRIE	STHOMAS	Brief Supporting Appeal

State of Idaho vs. Jesse Carl Riendeau

Date	Code	User		Judge
10/16/2013	NOTS	CAMPBELL	Notice Of Settling Transcript On Appeal and Briefing Schedule	Benjamin R. Simpson
10/17/2013	ORDR	LARSEN	Order Of Voluntary Disqualification - Judge Simpson	Benjamin R. Simpson
	DISF	SVERDSTEN	Disqualification Of Judge Simpson - Self	Benjamin R. Simpson
10/23/2013		SVERDSTEN	Order Assigning Judge Haynes on Voluntary Disqualification	Lansing L. Haynes
	ADMR	SVERDSTEN	Administrative assignment of Judge Stegner	Lansing L. Haynes
10/24/2013	ORDR	HOFFMAN	Order Assigning Judge Stegner	John R. Stegner
11/26/2013	ORDR	HOFFMAN	Order Fixing Briefing Schedule And Setting Oral Argument	John R. Stegner
	HRSC	HOFFMAN	Hearing Scheduled (Oral Argument on Appeal 02/07/2014 11:30 AM) To Be Held At The Kootenai County Courthouse	John R. Stegner
1/16/2014	BRFR	GRANGE	Brief Of Respondent	John R. Stegner
1/22/2014	BRIE	STHOMAS	Reply Brief	John R. Stegner
2/7/2014	HRHD	HOFFMAN	Hearing result for Oral Argument on Appeal scheduled on 02/07/2014 11:30 AM: Hearing Held To Be Held At The Kootenai County Courthouse - hrg held telephonic due to weather - minutes received from Terry	John R. Stegner
3/7/2014	MEMO	HOFFMAN	Memorandum Opinion	John R. Stegner
3/11/2014	APSC	OREILLY	Appealed To The Supreme Court	John R. Stegner
4/2/2014	NAPL	OREILLY	Notice Of Appeal Due Date From Supreme Court	John R. Stegner
4/24/2014	NLTR	OREILLY	Notice of Lodging Transcript Reporter Sheryl Engler Pages 25	John R. Stegner

**CITY OF COEUR D'ALENE - CITATION**

On the court designated below the undersigned certifies that he/she has just and reasonable grounds to believe and does believe that on:

County: KOOTENAI State: ID Citation #: **C2501703**  
DR#: 13C07815

STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED: **SS**

2013 MAR 21 AM 10:53

CLERK DISTRICT COURT

DEPUTY

**VIOLATOR**

Last Name: **RIENDEAU** MI: **CARL**  
First Name: **JESSE** DOB: **[REDACTED]**  
Hm. Address: **1138 N 10TH ST** Hm. Phone: **208-964-3356**  
City: **COEUR D ALENE** State: **ID** Zip: **83815**  
Height: **603** Weight: **170** Sex: **M** Race: **W** Eyes: **BLU** Hair: **BRO**  
DL#: **[REDACTED]** DL State: **ID** Lic. Expires: **2013**  
SS#: **[REDACTED]** Operator: **N**

Bus.Name:

Bus.Addr.:

Bus.Phone:

Juvenile: **N** CDL: **N** Class: **D**

**REGISTRATION**

Yr. Veh: **1996** Veh. Lic#: **K466089** State: **ID**  
Make: **TOYT** Model: **CAMRY**  
Color: **GRY** Style: **4D**  
VIN: **JT2BG12K1T0418606**

**LOCATION**

Upon a Public Street or Highway or Other Location Namely:  
**1138 N 10TH ST**

Hwy: Mp:

**VIOLATIONS**

Did unlawfully commit the following Offense(s) on: **03/21/2013, 02:17**

Infraction Citation: **N** Misdemeanor Citation: **Y** Care: **N**

GVWR 26001+: **N** 16+ Persons: **N** Hazmat: **N**

Accident: **N** Companion Citation: **N**

Posted Speed: Observed Speed:

To Wit:

Driving Under The Influence To Wit: **BrAC .175/.181**

**18-8004 {M}**

To Wit:

Witnessing Officer:

Serial# Addr.:

Dept.:

**SIGNATURE**

hereby certify service upon the defendant personally on **3/21/2013, 02:17**

Officer: 

Officer name: **M.RIOS**

Officer ID: **K22**

**COURT INFORMATION**

**KOOTENAI**  
**324 W GARDEN AVE.**  
**COEUR D'ALENE, ID 83814-1972**  
**208-446-1170**  
**BOOKED INTO PSB**

Contact the Court no later than 04/09/2013. This IS NOT the time for you to appear before a judge. It is however the time by which YOU MUST contact the Clerk of the District Court regarding your citation.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI MAGISTRATE DIVISION

STATE OF IDAHO,

Plaintiff,

vs.

Riendeau, Jesse C.

Defendant

DEPUTY

AFFIDAVIT

CLERK DISTRICT COURT

2013 MAR 21 AM 9:02

STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED: JSS

CR13-5363

I, M. Riendeau K-22, a Police officer

employed by the Coeur d'Alene City Police Department, do solemnly swear

that the attached reports are true and correct copies of my original reports

and, further, that the attached reports and uniform citation are true and

correct accounts of the incident leading to the arrest on Idaho Uniform

Citation No. C 2501703

[Signature]  
Affiant

SUBSCRIBED and SWORN to before me this 21 day of March, 20 13.

[Signature]  
Notary Public of Idaho

Residing at: Kootenai County

3/17/14  
My commission expires

TODD A. HEDGE  
NOTARY PUBLIC  
STATE OF IDAHO

PD132 (6/08)

# **PRE-BOOKING INFORMATION SHEET** **KOOTENAI COUNTY PUBLIC SAFETY BUILDING**

Booking # \_\_\_\_\_

Name ID # \_\_\_\_\_ Date 03/21

## **ARRESTEE:**

Name Riendeau Jesse Carl  
Last First Middle

AKA \_\_\_\_\_

Address 1138 N 10th St.

City CDA ST ID Zip 83814

Home Phone 208-964-3356 SS# [REDACTED]

City/State of Birth CDA, ID DOB [REDACTED]

D.L. # CL222852F State ID Occupation Bar tender Work Phone # \_\_\_\_\_

## **PHYSICAL DESCRIPTION:**

Height 6' 03" Weight 185 Sex M Hair Brn Eyes Blu

Race W Glasses N Contacts Y Facial Hair —

Scars, Marks, Tattoo's —

Clothing Description Black Coat, Blue Jeans

## **ARRESTING OFFICER INFORMATION:**

Date / Time of Arrest 03/21/13 1:026 Location 1138 N 10th Dist 82

Arresting Officer M. Rio # K-22 Agency CDA PD Arrival at PSB 0140

## **CHARGES AND BAIL:** ARREST TYPE: ☒ ON-VIEW ☐ WARRANT ☐ CITIZEN ☐ OTHER

M/F	Code	Charges	Bail	Sentence	Warrant or Case #
1. M	18-800Y	DUI 1st offense	\$500		
2.					
3.					
4.					
5.					
6.					

Is the arresting officer aware of any mental or physical conditions this inmate may have which might affect his/her safety or ability to be held without special attention by jail staff? ☒ No, ☐ Yes (Explain) \_\_\_\_\_

Did the arrestee arrive with prescription medication? ☒ No, ☐ Yes

## **VEHICLE INFORMATION:**

Vehicle Lic. KY66089 ST ID YR 96 Make Toyota Model Camry Body 4dr Color(s) Gray

Vehicle Disposition Left on scene

**CITIZEN ARREST:** I hereby arrest the above named suspect on the charge(s) indicated and request a peace officer to take him/her into custody. I will appear as directed and sign a complaint against the person I have arrested.

Arresting Persons Name		Address		Phone #	
Race		Sex		DOB	
Employer		Phone #			
Officer	ID #	Approved By	ID #	Date	

## **VICTIM'S RIGHTS INFORMATION:**

Name:	Code	Mult. Victims	Address:	Phone:
		<input type="checkbox"/> Yes <input type="checkbox"/> No		
Occupation:	Race/Sex	Age	DOB	Bus. Phone:
JESSE CARL RIENDEAU			41982	

Accepted by: <u>2237</u>
Agency Report # <u>13C07815</u>
BAC <u>.175</u> <u>1.181</u>
Warrant Check _____
Prob. Check _____
Prob. Officer _____
Locker # _____
Location _____
Hold For: _____
For DUI Charge: _____
Was Call Requested _____
Was Call Made _____

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, )  
 )  
Plaintiff, )  
 )  
vs. ) ORDER FINDING PROBABLE CAUSE  
 )  
Riendeau, Jesse C )  
 ) CITATION NUMBER C2501703  
Defendant, )

The above-named defendant having been charged with, or arrested for, the  
offense(s) of DUI 1st offense 18-8003

and the Court having examined the affidavits of M. Rios K-22  
\_\_\_\_\_, the Court finds probable cause, based on substantial evidence,  
for believing that said offense has been committed and that the said defendant  
committed it.

IT IS THEREFORE ORDERED that a Warrant or Summons may be issued for  
the arrest of the above-named defendant, or, if the defendant has been arrested without  
Warrant, that the defendant may be detained, and that he/she may be required to post  
bail prior to being released.

DATED this 21 day of March, 2013

[Signature]  
Magistrate

ORDER FINDING PROBABLE CAUSE  
PD #133

JESSE CARL RIENDEAU

IN THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI MAGISTRATE DIVISION

STATE OF IDAHO, )  
 )  
Plaintiff, )  
 )  
vs. ) AFFIDAVIT  
 )  
Riendeau, Jesse C )  
 )  
Defendant )

I, M. Rios K-22, a Police officer  
employed by the Coeur d'Alene City Police Department, do solemnly swear  
that the attached reports are true and correct copies of my original reports  
and, further, that the attached reports and uniform citation are true and  
correct accounts of the incident leading to the arrest on Idaho Uniform  
Citation No. C2501703.

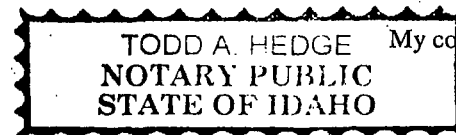
[Signature]  
Affiant

SUBSCRIBED and SWORN to before me this 21 day of March, 2013.

[Signature]  
Notary Public of Idaho

Residing at: Kootenai County

3/17/14  
My commission expires



KOOTENAI CO SO  
INTOXILYZER - ALCOHOL ANALYZER  
MODEL 5000EN SN 68-013330  
03/21/2013 SOLUTION LOT NO. 12801

SUB NAME=RIENDEAU, JESSE, C  
SUB DOB = [REDACTED]  
O.L.N.=ID [REDACTED]  
OPER NAME=RIOS, MARIO, R  
ARREST AGENCY=2802

TEST	BrAC	TIME
AIR BLANK	.000	02:12 PDT
INTERNAL STANDARDS	PASSED	02:12 PDT
AIR BLANK	.000	02:12 PDT
SIMULATOR TEMPERATURE IN RANGE.		
SIM CHK #0040	.084	02:13 PDT
ACCEPTABLE		
AIR BLANK	.000	02:13 PDT
SUBJECT TEST	.175	02:14 PDT
AIR BLANK	.000	02:15 PDT
SUBJECT TEST	.181	02:15 PDT
AIR BLANK	.000	02:16 PDT

  
\_\_\_\_\_  
OPERATORS SIGNATURE

0153  
\_\_\_\_\_  
TIME FIRST OBSERVED



# Notice or Suspension for Failure of Evidentiary Testing

(Advisory for Sections 18-8002 and 18-8002A, Idaho Code)

DR# 13C07815

Issued To:

Riendeau Jesse Carl  
Last Name First Middle Date of Birth  
1138 N 10th St  
Mailing Address  
CDA ID 83814  
City State Zip

Kootenai 03/21/13 0126  
County of Arrest Date of Arrest Time of Arrest  
CL 227-852 F ID D  
Driver's License Number State License Class  
C2501703 Operating CMV? ☐ Yes ☒ No  
Citation # Transporting Hazmat? ☐ Yes ☒ No

## Suspension Advisory

- I have reasonable grounds to believe that you were driving or were in physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances. You are required by law to take one or more evidentiary test(s) to determine the concentration of alcohol or the presence of drugs or other intoxicating substances in your body. After submitting to the test(s) you may, when practical, at your own expense, have additional test(s) made by a person of your own choosing. You do not have the right to talk to a lawyer before taking any evidentiary test(s) to determine the alcohol concentration or presence of drugs or other intoxicating substances in your body.
- If you refuse to take or complete any of the offered tests pursuant to Section 18-8002, Idaho Code:
  - You are subject to a civil penalty of two hundred fifty dollars (\$250).
  - You have the right to submit a written request within seven (7) days to the Magistrate Court of Kootenai County for a hearing to show cause why you refused to submit to or complete evidentiary testing and why your driver's license should not be suspended.
  - If you do not request a hearing or do not prevail at the hearing, the court will sustain the civil penalty and your license will be suspended with absolutely no driving privileges for one (1) year if this is your first refusal; and two (2) years if this is your second refusal within ten (10) years.
- If you take and fail the evidentiary test(s) pursuant to Section 18-8002A, Idaho Code:
  - I will serve you with this **NOTICE OF SUSPENSION** that becomes effective thirty (30) days from the date of service on this notice suspending your driver's license or driving privileges. If this is your first failure of an evidentiary test within the last five (5) years, your driver's license or driving privileges will be suspended for ninety (90) days with absolutely no driving privileges of any kind during the first thirty (30) days. You may request restricted non-commercial driving privileges for the remaining sixty (60) days of the suspension. Restricted driving privileges will not allow you to operate a commercial motor vehicle. If this is not your first failure of an evidentiary test within the last five (5) years, your driver's license or driving privileges will be suspended for one (1) year with absolutely no driving privileges of any kind during that period.
  - You have the right to an administrative hearing on the suspension before the **Idaho Transportation Department** to show cause why you failed the evidentiary test and why your driver's license should not be suspended. The request must be made in writing and received by the department within seven (7) calendar days from the date of service on this **NOTICE OF SUSPENSION**. You also have the right to judicial review of the Hearing Officer's decision.
- If you are admitted to a problem solving court program and have served at least forty-five (45) days of an absolute suspension of driving privileges, you may be eligible for a restricted permit for the purpose of getting to and from work, school, or an alcohol treatment program.

**NOTICE OF SUSPENSION** If you have failed the evidentiary test(s), your driving privileges are hereby suspended per #3 above, commencing thirty (30) days from the date of service on this notice. If a blood or urine test was administered, the department may serve a **Notice of Suspension** upon receipt of the test results.

Date of Service: 03/21/13

*This Suspension for Failure or Refusal of the Evidentiary Test(s) is separate from any other Suspension ordered by the Court. Please refer to the back of this Suspension Notice for more information.*

Signature of Reporting Officer <u>[Signature]</u>	Print Name and I.D. Number of Reporting Officer <u>Mario Rios K22</u>	Agency Code <u>2802</u>	Telephone Number <u>769-2320</u>
--	--	----------------------------	-------------------------------------

Department use only Failure: ☒ Breath ☐ Urine/Blood ☐ Refusal

White Copy - If failure - to ITD; if refusal - to Court

Yellow Copy - to Law Enforcement

Pink Copy - to Court

Goldenrod Copy - to Driver



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI.

THE STATE OF IDAHO,

Plaintiff,

Jesse C. Riendeau

Defendant.

DOB [REDACTED]

DL : [REDACTED]

State: ID

State of Idaho,

County of Kootenai

COURT CASE NUMBER \_\_\_\_\_  
PROBABLE CAUSE AFFIDAVIT IN SUPPORT  
OF ARREST AND/OR REFUSAL TO TAKE TEST

SS

I, MARIO RIOS K-22 the undersigned, being first duly sworn on oath, depose and say that:

1. I am a peace officer employed by City of Coeur d' Alene.

2. The defendant was arrested on 03/21/13 at 0126 ☒ AM ☐ PM for the crime of driving while under the influence of alcohol, drugs or any other intoxicating substances pursuant to Section 18-8004 Idaho Code. Second or more DUI offense in the last ten years? ☐ YES ☒ NO ☐ FELONY ☒ MISDEMEANOR

3. Location of Occurrence: 1138 N 10TH ST,  
Kootenai County, Idaho.

4. Identified the defendant as: JESSE C. RIENDEAU by: (check box)

☐ Military ID ☐ State ID Card ☐ Student ID Card ☒ Drivers License  
☐ Credit Cards ☐ Paperwork found ☐ Verbal ID by defendant

Witness: \_\_\_\_\_ identified defendant.

Other: \_\_\_\_\_

5. Actual physical control established by: ☒ Observation by affiant ☐ Observation by Officer \_\_\_\_\_

☐ Admission of Defendant to: \_\_\_\_\_, ☐ Statement of Witness: \_\_\_\_\_

☐ Other: \_\_\_\_\_

6. I believe that there is probable cause to believe the defendant committed such crime because of the following facts:

(NOTE: You must state the source of all information provided below. State what you observed and what you learned from someone else, identifying that person):

PROBABLE CAUSE FOR STOP AND ARREST:

I was w/b on Harrison Ave. when I saw a vehicle e/b in the bike lane. I turned around and was able to contact the driver of the vehicle as he was exiting to enter his residence. I could see his eyes were glossy, which in conjunction with the driving, led me to believe he was intoxicated. I administered SFSTs and based on these, I placed him under arrest for DUI.

D.U. I. NOTES

Odor of alcoholic beverage	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Admitted drinking alcoholic beverage	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Slurred speech	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Impaired memory	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Glassy/bloodshot eyes	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No

Sobriety Tests – Meets Decision Points?

Gaze Nystagmus	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Walk & Turn	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
One Leg Stand	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Crash Involved	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Injury	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

Other: \_\_\_\_\_

Drugs Suspected: ☐ Yes ☒ No Drug Recognition Evaluation Performed ☐ Yes ☒ No

Reason Drugs are Suspected: \_\_\_\_\_

Prior to being offered the test, the defendant was substantially informed of the consequences of refusal and failure of the test as required by Section 18-8002 and 18-8002A, Idaho Code.

☒ Defendant was tested for alcohol concentration, drugs or other intoxicating substances. The test(s) was/were performed in compliance with Sections 18-8003 & 18-8004(4), Idaho Code and the standards and methods adopted by the Department of Law Enforcement.

BAC: .175 / .181 / \_\_\_\_\_ by: ☒ Breath Instrument Type: ☒ Intoxilyzer 5000 ☐ Alco Sensor

Serial# of the instrument: 38-013330

☐ Blood AND/OR ☐ Urine Test Results Pending? ☐ Yes ☐ No (Attached)

Name of person administering breath test: M. RIOS K22 Date certification expires: 04/30/14

☐ Defendant refused the test as follows:

By my signature and in the presence of a person authorized to administer Oaths in the State of Idaho, I hereby solemnly swear that the information contained in this document and attached reports and documents that may be included herein is true and correct to the best of my information and belief.

Dated: 03/21/13

Signed: [Signature]

Mario Rios

(affiant)

Subscribed and sworn to before me on

3/21/13  
(Date)

PERSON AUTHORIZED TO  
ADMINISTER OATHS.

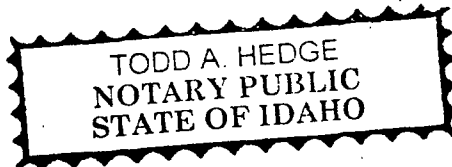
Title: \_\_\_\_\_

(or)

[Signature]  
NOTARY PUBLIC FOR IDAHO

Residing at: KOOTENAI COUNTY

My Commission expires: 2/17/14





# Coeur d'Alene Police

Report for CDA Incident 13C07815

Nature: DUI  
Location: 82

Address: 1138 N 10TH ST  
COEUR D'ALENE ID 83814

Offense Codes: NC

Received By: C.HALLGREN

How Received: O

Agency: CDA

Responding Officers:

Responsible Officers: M.RIOS

Disposition: ACT 03/21/13

When Reported: 01:27:13 03/21/13

Occurred Between: 01:26:42 03/21/13 and 01:26:42 03/21/13

Assigned To:

Detail:

Date Assigned: \*\*/\*\*/\*\*

Status:

Status Date: \*\*/\*\*/\*\*

Due Date: \*\*/\*\*/\*\*

Complainant: 9301

Last: CDAPD

First:

Mid:

DOB: \*\*/\*\*/\*\*

Dr Lic:

Address: 3818 N SCHREIBER WAY

Race: Sex:

Phone: (208)769-2320

City: COEUR D'ALENE, ID 83815

## Offense Codes

Reported: NC Not Classified

Observed:

Additional Offense: NC Not Classified

## Circumstances

Responding Officers:

Unit :

M.RIOS

K22

SP.MORTENSEN

K77

Responsible Officer: M.RIOS

Agency: CDA

Received By: C.HALLGREN

Last Radio Log: \*\*:\*\*:\*\* \*\*/\*\*/\*\*

How Received: O Officer Report

Clearance: 1 ARREST REPORT TAKEN

When Reported: 01:27:13 03/21/13

Disposition: ACT Date: 03/21/13

Judicial Status:

Occurred between: 01:26:42 03/21/13

Misc Entry:

and: 01:26:42 03/21/13

Modus Operandi:

Description :

Method :

LT

LOCATION TYPE

LT13 HWY/

D

DRUGS/LIQUOR

D33

## Involvements

Date

Type

Description

"Printed on "03/21/13

03/21/13	Name	CDAPD,	Complainant
03/21/13	Name	RIENDEAU, JESSE CARL	OFFENDER
03/21/13	Vehicle	GRY 1996 TOYT CAMRY ID	MENTIONED
03/21/13	Cad Call	01:27:13 03/21/13 DUI	Initiating Call

### Narrative

13C07815  
 Misdemeanor  
 DUI 1st Offense 18-8004  
 M. Rios  
 Eticket: C2501703

03/21/13, On this date, I was w/b on Harrison when I saw a vehicle approaching e/b Harrison driving in the bike lane. I turned around on the vehicle and caught up to it as it pulled into the driveway of 1138 N. 10th St. I parked on the street and approached the driver, who I identified as Jesse Riedeneau by his Idaho DL. I immediately could see that his movements were lethargic and his eyes were glossy. This as well as his earlier driving, was indicative of a driver under the influence. I asked him how much he had to drink and he said "nothing at all". I asked him if he used any drugs and he said no. I asked him again how much he had to drink and he said nothing. Eventually he told me he had a couple of Dos Equis beers at a restaurant at 1930.

Based on my observations, I administered the SFSTs to Jesse. Jesse had difficulties following directions during the SFSTs. See the SFST influence report for further details on the performance of these tests. Based on the results, I placed Jesse under arrest for DUI and transported him to KCPSB. As I placed Jesse in the vehicle I could smell the strong and distinct odor of an alcoholic beverage. I had not smelled the odor earlier due to the strong wind conditions and his cologne.

Once at KCPSB, I spoke to Jesse in pre-booking. I checked his mouth for any foreign substance and read him the ALS form during the observation period. After the observation period, I had Jesse give two breath samples on the intoxilyzer. Jesse's BrAC was .175/.181. Based on these results, Jesse was booked for DUI 1st Offense.

All VIEWU and COBAN videos were uploaded to VIPER.

### Vehicles

#### Vehicle Number:

13-02850

License Plate: K466089

State: ID

Vehicle Year: 1996

Make: TOYT Toyota

Color: GRY /

Vehicle Type:

Owner:

Last: RIENDEAU

First: JESSE

Mid: CARL

License Type:

Expires: \*\*/\*\*/\*\*

VIN:

Model: CAMRY

Doors: 4

Value: \$0.00

DOB: [REDACTED]

Race: W

Sex: M

Dr Lic: [REDACTED]

Phone: (208)964-3356

Address: 1138 N 10TH ST

City: COEUR D'ALENE, ID 83814

Agency: CDA COEUR D'ALENE POLICE

Date Recov/Rcvd: \*\*/\*\*/\*\*

DEPT

Officer: M.RIOS

Area:

UCR Status:

Wrecker Service:

Local Status: III Involved in Incident

Storage Location:

Status Date: 03/21/13

Release Date: \*\*/\*\*/\*\*

Comments:

### Name Involvements:

Complainant : 9301

Last: CDAPD

First:

Mid:

DOB: \*\*/\*\*/\*\*

Dr Lic:

Address: 3818 N SCHREIBER WAY

Race:

Sex:

Phone: (208)769-2320

City: COEUR D'ALENE, ID 83815

OFFENDER : 419561

Last: RIENDEAU

First: JESSE

Mid: CARL

DOB: [REDACTED]

Dr Lic: [REDACTED]

Address: 1138 N 10TH ST

Race: W

Sex: M

Phone: (208)964-3356

City: COEUR D'ALENE, ID 83814

## ONE-LEG STAND TEST

### INSTRUCTIONS:

- Stand with your heels together and your arms at your sides.
- Do not begin the test until I tell you to.
- Do you understand?
- When I tell you to, raise one foot approximately 6" off the ground and count out loud in following manner, "1001, 1002, 1003" and so on, until I tell you to stop. (Demonstrate)
- While counting, keep your leg straight, point your foot out and keep your arms at your sides.
- Do you understand the instructions?  
If so, you may begin. (Time the subject)

SCORING:	0 - 10	11 - 20	21 - 30
Sways	X	X	X
Raises Arms	X	X	X
Hops			X
Puts foot down	X	X	X

Total Clues: 4

Cannot do test: (Explain) \_\_\_\_\_

Other: \_\_\_\_\_

Case No. 13C07815  
 Suspect Riendeau, Jesse C.  
 Date 03/2/13 Time 0126  
 Officer M. L. S.

## HORIZONTAL GAZE NYSTAGMUS

### INSTRUCTIONS:

- Do you wear contacts?
- Keep your head still.
- Focus your eyes on the stimulus.
- Follow the stimulus with your eyes only.
- Do you understand?

### HGN Test Results:

	L	R
Lack of smooth pursuit	—	—
Distinct nystagmus at maximum deviation	—	—
Onset of nystagmus prior to 45 degrees	—	—

Other indicators: Would project the  
movements of my finger or not  
follow it completely. Had to make  
multiple passes

Total Clues: 6

Vertical Nystagmus: Yes ☐ No ☒

# WA' AND TURN TEST

## INSTRUCTIONS:

- Put your left foot on the line and your right foot in front of it, heel touching the toe.
- Keep your arms at your side.
- Do not begin until I tell you to.
- When I tell you to, take 9 heel-to-toe steps down the line.
- When you get to your 9th step, turn taking a series of small steps with the other foot.
- Take 9 heel-to-steps back.
- Count your steps out loud.
- Watch your feet at all times.
- Keep your arms at your sides.
- Do not stop once you begin.
- Do you understand?

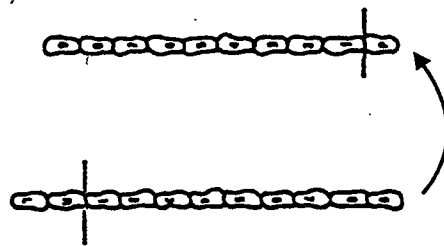
## SCORING:

### INSTRUCTION STAGE:

Can not keep balance

Starts to soon

X



	First 9	Second 9
WALKING STATE:		
Stops walking	X	
Misses heel-to-toe	X	X
Steps off line	X	X
Raises arms	X	X
Improper turn	X	
Actual steps taken	X	
Cannot do test		

Describe turn: Turned wrong direction and  
no small steps.

Other: Missed even heel to toe and  
stepped off line. Did not perform  
the test at all as demonstrated.





# **Notice or Suspension for Failure of Evidentiary Testing** (Advisory for Sections 18-8002 and 18-8002A, Idaho Code)

DR# 13C 07815

**Issued To:**

Riendeau Jesse Carl  
Last Name First Middle Date of Birth  
1138 N 10th St  
Mailing Address  
COA ID 83814  
City State Zip

Kootenai 03/21/13 0126  
County of Arrest Date of Arrest Time of Arrest  
CL 222 852 F ID D  
Driver's License Number State License Class  
C2501703 Operating CMV? ☐ Yes ☒ No  
Citation # Transporting Hazmat? ☐ Yes ☒ No

## **Suspension Advisory**

- I have reasonable grounds to believe that you were driving or were in physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances. You are required by law to take one or more evidentiary test(s) to determine the concentration of alcohol or the presence of drugs or other intoxicating substances in your body. After submitting to the test(s) you may, when practical, at your own expense, have additional test(s) made by a person of your own choosing. You do not have the right to talk to a lawyer before taking any evidentiary test(s) to determine the alcohol concentration or presence of drugs or other intoxicating substances in your body.
- If you refuse to take or complete any of the offered tests pursuant to Section 18-8002, Idaho Code:
  - You are subject to a civil penalty of two hundred fifty dollars (\$250).
  - You have the right to submit a written request within seven (7) days to the **Magistrate Court of** Kootenai **County** for a hearing to show cause why you refused to submit to or complete evidentiary testing and why your driver's license should not be suspended.
  - If you do not request a hearing or do not prevail at the hearing, the court will sustain the civil penalty and your license will be suspended with absolutely no driving privileges for one (1) year if this is your first refusal; and two (2) years if this is your second refusal within ten (10) years.
- If you take and fail the evidentiary test(s) pursuant to Section 18-8002A, Idaho Code:
  - I will serve you with this **NOTICE OF SUSPENSION** that becomes effective thirty (30) days from the **date of service** on this notice suspending your driver's license or driving privileges. If this is your first failure of an evidentiary test within the last five (5) years, your driver's license or driving privileges will be suspended for ninety (90) days with absolutely no driving privileges of any kind during the first thirty (30) days. You may request restricted non-commercial driving privileges for the remaining sixty (60) days of the suspension. Restricted driving privileges will not allow you to operate a commercial motor vehicle. If this is not your first failure of an evidentiary test within the last five (5) years, your driver's license or driving privileges will be suspended for one (1) year with absolutely no driving privileges of any kind during that period.
  - You have the right to an administrative hearing on the suspension before the **Idaho Transportation Department** to show cause why you failed the evidentiary test and why your driver's license should not be suspended. The request must be made in writing and received by the department within seven (7) calendar days from the **date of service** on this **NOTICE OF SUSPENSION**. You also have the right to judicial review of the Hearing Officer's decision.
- If you are admitted to a problem solving court program and have served at least forty-five (45) days of an absolute suspension of driving privileges, you may be eligible for a restricted permit for the purpose of getting to and from work, school, or an alcohol treatment program.

**NOTICE OF SUSPENSION** If you have failed the evidentiary test(s), your driving privileges are hereby suspended per #3 above, commencing thirty (30) days from the date of service on this notice. If a blood or urine test was administered, the department may serve a *Notice of Suspension* upon receipt of the test results.

**Date of Service:** 03/21/13

**This Suspension for Failure or Refusal of the Evidentiary Test(s) is separate from any other Suspension ordered by the Court. Please refer to the back of this Suspension Notice for more information.**

Signature of Reporting Officer <u>[Signature]</u>	Print Name and I.D. Number of Reporting Officer <u>Mario Rios F 22</u>	Agency Code <u>2802</u>	Telephone Number <u>769-2320</u>
--	---	----------------------------	-------------------------------------

Department use only Failure: ☒ Breath ☐ Urine/Blood ☐ Refusal

White Copy - If failure - to ITD; if refusal - to Court

Yellow Copy - to Law Enforcement

Pink Copy - to Court

Goldenrod Copy - to Driver

STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED: )SS

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

2013 MAR 21 AM 10:53

CLERK DISTRICT COURT

STATE OF IDAHO,

Plaintiff,

vs.

Riendeau, Jesse C

Defendant,

DEPUTY

CR13-5363

ORDER FINDING PROBABLE CAUSE

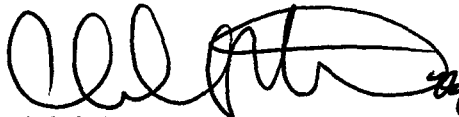
CITATION NUMBER C2501703

The above-named defendant having been charged with, or arrested for, the offense(s) of DUI 1<sup>st</sup> offense 18-8002/

and the Court having examined the affidavits of M. Rios K-22, the Court finds probable cause, based on substantial evidence, for believing that said offense has been committed and that the said defendant committed it.

IT IS THEREFORE ORDERED that a Warrant or Summons may be issued for the arrest of the above-named defendant, or, if the defendant has been arrested without Warrant, that the defendant may be detained, and that he/she may be required to post bail prior to being released.

DATED this 21 day of March, 2013



Magistrate

ORDER FINDING PROBABLE CAUSE

PD #133

<b>Description</b>	CR 2013-5363 Riendeau, Jesse 20130408 Pretrial Conference Arraignment Judge Caldwell Clerk Cassie Poole Def Rights 08:33:22		
<b>Date</b>	4/8/2013	<b>Location</b>	1K-COURTROOM11
<b>Time</b>	<b>Speaker</b>	<b>Note</b>	
<u>09:21:08 AM</u>	Judge Caldwell	Defendant present not in custody	
<u>09:21:16 AM</u>	Riendeau, Jesse	Did see rights video Read and understand rights form for driving under the influence Understand penalties for dui Would like attorney	
<u>09:22:29 AM</u>	Clerk	Swears defendant	
<u>09:22:46 AM</u>	Judge Caldwell	Appoint public defender Enter not guilty plea set for pretrial conference arraignment	
<u>09:23:51 AM</u>	End		

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[www.fortherecord.com](http://www.fortherecord.com)

MUST BE COMPLETED  
TO BE CONSIDERED

Filed 4.8.13 AT 9:22A  
CLERK OF THE DISTRICT COURT  
BY Cassidy DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

APPLICATION FOR: Jesse Carl Riendeau  
☒ DEFENDANT ☐ JUVENILE ☐ CHILD ☐ PARENT

CASE NO. CR13-5363

DOB [REDACTED]

BY n/a  
PARENT or GUARDIAN OF MINOR  
DOB n/a

FINANCIAL STATEMENT AND ORDER

**NOTE:** If this application is being made on behalf of a minor, please answer the following questions as they apply to his/her parents or legal guardian. Include information for you and your spouse.

I, the above named defendant (or the parent(s) on behalf of a minor), being first duly sworn on oath, depose and say in support of my request for court appointed counsel: ☒

My current mailing address is: 1138 N 10<sup>th</sup> St Coeur d'Alene ID 83814  
Street or P.O. Box City State Zip Code

My current telephone number or message phone is: 208-964-3356

Crimes Charged: DUI

I request the Court appoint counsel at county expense; and I agree to reimburse the county for the cost of said defense, in the sum and upon the terms as the Court may order.

BELOW IS A TRUE AND CORRECT STATEMENT OF MY FINANCIAL CONDITION:

1. EMPLOYMENT:

A. Employed: ☒ yes ☐ no B. Spouse Employed: n/a yes ☐ no  
C. If not employed, or self-employed, last date of employment n/a  
D. My employer is: Hagadon Hospitality  
Address: 100 Sherman Ave

2. HOUSEHOLD INCOME MONTHLY (Include income of spouse):

Wages before deductions \$ 1000 before Taxes Other income: (Specify: Child Support, S.S., V.S., A.D.C.,  
Less Deductions \$ 850 After Taxes Food Stamps, Etc.)  
Net Monthly Wages \$ 850 n/a \$ n/a

3. HOUSEHOLD EXPENSES MONTHLY:

Rent or Mortgage Payment	\$ <u>300</u>	Child Care	\$ _____
Utilities	\$ <u>50</u>	Recreation	\$ _____
Clothing	\$ _____	Medical	\$ _____
Transportation	\$ <u>100</u>	Insurance	\$ <u>100</u>
School	\$ _____	Other (Specify)	\$ _____
Food	\$ <u>250</u>		

3. HOUSEHOLD EXPENSES MONTHLY: (cont.)

DEBTS: Creditor n/a  
Creditor n/a  
Creditor n/a

Total \$ X per mo  
Total \$ X per mo  
Total \$ X per mo

4. ASSETS:

A. I (we) have cash on hand or in banks \$ 50  
B. I (we) own personal property valued at \$ 0  
C. I (we) own vehicle(s) valued at \$ 1500  
D. I (we) own real property valued at \$ 0  
E. I (we) own stocks, bonds, securities, or interest therein \$ 0

5. THE FOLLOWING ALSO AFFECTS MY FINANCIAL CONDITION (Specify): n/a

6. DEPENDENTS: X self        spouse        children        other (specify)         
(number)

[Signature]

[Signature: Jesse Rindeau]  
APPLICANT

Subscribed and sworn to before me this 8 day of April, 2013.

[Signature: Sworn In Court]  
NOTARY PUBLIC/CLERK/JUDGE

The above named ✓ defendant        parent        guardian appeared before the court on the aforesaid charge and requested the aid of counsel. The court having considered the foregoing, and having personally examined the applicant; ✓ **ORDERS**        **DENIES** the appointment of the service of counsel.

The applicant is ordered to pay \$        monthly beginning       , 20       for the cost of appointed counsel. Payments are to continue until

[ ] notified by the court that no further amount is due.  
[ ] the sum of \$        has been paid.

THE APPLICANT IS ORDERED TO PAY REIMBURSEMENT FOR THE COST OF APPOINTED COUNSEL AT THE CONCLUSION OF THE CASE; THIS AMOUNT MAY BE IN ADDITION TO ANY SUMS ORDERED ABOVE.

ENTERED this 8 day of April, 2013

[Signature]  
JUDGE #267

Custody Status:        In ✓ Out

Copies to:

✓ Prosecuting Attorney         
✓ Public Defender       

Bond \$       

4813  
Date Deputy Clerk [Signature: Cassi Poole]

**ORIGINAL**

Jay Logsdon, Deputy Public Defender  
The Law Office of the Public Defender of Kootenai County  
PO Box 9000  
Coeur d'Alene, Idaho 83816  
Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 8759

STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED

2013 APR 23 AM 10:00

CLERK DISTRICT COURT

DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

**STATE OF IDAHO,**

Plaintiff,

V.

**JESSE CARL RIENDEAU,**

Defendant.

**CASE NUMBER CR-13-0005363**

**Misd**

**MOTION TO SUPPRESS RESULTS OF  
BREATH TEST**

COMES NOW, the above named defendant by and through his attorney, Jay Logsdon, Deputy Public Defender, and hereby moves the Court for an Order suppressing the use of the results of any breath test evidentiary testing done in this case. The evidence must be suppressed because the search by the officers was unlawful and without legal justification, therefore in violation of the Fourth Amendment to the Constitution of the United States and Article I § 17 of the Constitution of the State of Idaho.

Article I Section 17 of the Idaho Constitution affords greater protection than the Fourth Amendment to the United States Constitution based upon the long-standing jurisprudence of the Idaho appellate courts, the uniqueness of the State of Idaho, and the uniqueness of the Idaho Constitution. See *State v. Cada*, 129 Idaho 224 (Ct.App.1996) (Idahoans have higher expectation of privacy in their land); *State v. Guzman*, 122 Idaho 981, 995 (1992) (not the exclusionary rule, but the

**MOTION TO SUPPRESS**

**Page 1**

constitutional provision itself impedes fact-finding function of Court- but this is a “price the framers anticipated and were willing to pay”); *State v. Thompson*, 114 Idaho 746 (1988) (Idahoans have a higher expectation of privacy in the home); *State v. LePage*, 102 Idaho 387 (1981) (judicial integrity mandates exclusionary rule); *State v. Rauch*, 99 Idaho 586 (1978) (admission of illegally seized evidence itself a violation of constitution); *State v. Arregui*, 44 Idaho 43 (1927) (application of exclusionary rule in Idaho 34 years prior to *Mapp v. Ohio*, 367 U.S. 643 (1961)).

Counsel requests that this motion be set for hearing in order to present oral argument, evidence and/or testimony in support thereof. Requested time is 15 minutes.

DATED this 17 day of April, 2013.

THE LAW OFFICE OF THE PUBLIC  
DEFENDER OF KOOTENAI COUNTY

BY:

Jay Logsdon  
JAY LOGSDON  
DEPUTY PUBLIC DEFENDER

#### CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same as indicated below on the 23 day of April, 2013, addressed to:

Coeur d'Alene Prosecutor FAX 769-2326

       Via Fax

  X   Interoffice Mail

Carl Aufstrange

MOTION TO SUPPRESS

Page 2

**ORIGINAL**

Jay Logsdon, Deputy Public Defender  
The Law Office of the Public Defender of Kootenai County  
PO Box 9000  
Coeur d'Alene, Idaho 83816  
Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 8759

STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED: ss

2013 APR 23 AM 10:00

CLERK DISTRICT COURT  
DEPUTY  
CP

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO, )

Plaintiff, )

V. )

JESSE CARL RIENDEAU, )

Defendant. )

**CASE NUMBER CR-13-0005363**

**Misd**

**MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS RESULTS OF  
BREATH TEST**

COMES NOW, Jesse Riendeau, the above named defendant, by and through his attorney, Jay Logsdon, Deputy Public Defender, and hereby submits the following Memorandum in support of his Motion to Suppress previously filed with this Court.

**I. ISSUE PRESENTED**

**A. The defendant's consent to the breath test was nonconsensual.**

**II. FACTS**

On March 21, 2013, Officer Rios of the Coeur d'Alene Police Department read a Notice of Suspension for Failure of Evidentiary Testing to the defendant. He then waited fifteen minutes and conducted a breath test using the Intoxilyzer 5000. The results of that test were .175 and .181. The defendant was charged with driving under the influence.

**MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS RESULTS  
OF BREATH TEST**

**Page 1**



### III. ARGUMENT

#### **A. The defendant's consent to the breath test was nonconsensual.**

The Fourth Amendment to the United States Constitution guarantees every citizen the right to be free from unreasonable searches and seizures. *State v. Ramirez*, 145 Idaho 886, 888 (Ct.App. 2008); *State v. Salois*, 144 Idaho 344, 347 (Ct.App. 2007); *State v. Cerino*, 141 Idaho 736, 737 (Ct.App. 2005). Its purpose is “to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement agents, in order to ‘safeguard the privacy and security of individuals against arbitrary invasions.’ ” *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)).

The administration of a blood alcohol test constitutes a seizure of the person and a search within the purview of the Fourth Amendment to the United States Constitution. *Schmerber v. California*, 384 U.S. 757, 767 (1966); *State v. Diaz*, 144 Idaho 300, 302 (2007); *State v. DeWitt*, 145 Idaho 709, 711-12 (Ct.App.2008). Searches and seizures performed without a warrant are presumptively unreasonable. *Diaz*, 144 Idaho at 302; *DeWitt*, 145 Idaho at 712. To overcome the presumption, the State bears the burden of establishing two prerequisites. *Id.* First, the State must prove that a warrantless search fell within a well-recognized exception to the warrant requirement. *Id.* Second, the State must show that even if the search is permissible under an exception to the warrant requirement, it must still be reasonable in light of all of the other surrounding circumstances. *Id.*

In *Missouri v. McNeely*, --- S.Ct.---, 2013 WL 1628934 (U.S.Mo. 2013), the Supreme

**MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS RESULTS  
OF BREATH TEST**

**Page 2**

Court of the United States held that an officer's belief that a person is currently intoxicated and need to conduct an evidentiary test before the alcohol in their system evaporates does not *per se* create exigent circumstances that allow the officer to forego seeking a warrant.

The state of Idaho, like the other forty-nine states, has adopted what is called an implied consent law. *McNeely, supra*, at \*12. In Idaho, implied consent is based upon an individual's choice to accept the privilege of operating a motor vehicle upon Idaho's highways, see *DeWitt*, 145 Idaho at 712, provided that evidentiary testing is administered by a peace officer with reasonable grounds for suspicion of DUI. See I.C. § 18-8002(1). Whether or not a police officer gives the required warnings bears nothing on the issue of consent. See *DeWitt*, 145 Idaho at 714, 184 P.3d at 220 (even if the defendant is not notified of the consequences of refusal as required by I.C. § 18-8002(3), the results of the evidentiary test are admissible in a criminal prosecution); *State v. Burris*, 125 Idaho 289, 292, 869 P.2d 1384, 1387 (Ct.App.1994) (consent is not vitiated even if defendant is not informed of the consequences of refusal under I.C. § 18-8002(3)). The failure to advise a suspect of the consequences of refusal would be significant only with regard to the administrative suspension of the suspect's license following a refusal. *DeWitt*, 145 Idaho at 714 n. 4. Idaho courts have long held that a driver has no legal right to resist or refuse evidentiary testing. *Id.* at 713.

The Idaho Supreme Court in *State v. Woolery*, 116 Idaho 368, 372- (1989), discussed the legality of implied consent laws:

*As explained by the Wisconsin Supreme Court in State v. Zielke, 137 Wis.2d 39, 403 N.W.2d 427 (1987), "the implied consent law is an important weapon in the battle against drunk driving in this state. Neither the law, its history nor common sense allows this*

**MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS RESULTS  
OF BREATH TEST**

**Page 3**

*court to countenance its use as a shield by the defense to prevent constitutionally obtained evidence from being admitted at trial.”* 403 N.W.2d 427, 434.

*The South Dakota Supreme Court ruling in State v. Buckingham, 240 N.W.2d 84 (1976), that noncompliance with the implied consent statutes rendered the blood sample and test results inadmissible in a driving while intoxicated manslaughter prosecution, was overruled just one year later in State v. Hartman, 256 N.W.2d 131 (S.D.1977). The court explained:*

The *Buckingham* decision was without the benefit of argument from the state on the question of whether use of the “exclusionary rule” was necessary where there is a violation of the implied consent statutes. Upon further consideration, this court feels that it is necessary to modify the *Buckingham* decision.... Our consideration of the implied consent statutes must be prefaced upon the United States Supreme Court's decision in *Schmerber v. California* [citations omitted in quote] ... The exclusionary rule is a judicially created means of protecting the rights of citizens under the Fourth Amendment and Art. VI, § 11 of the South Dakota Constitution as a deterrent to unlawful police conduct. However, evidence obtained in violation of statutory rights is not inadmissible per se unless the statutory rights are of constitutional proportions or there exists no other method of deterring future violations of the rights which the legislature has granted to its citizens.

Hartman, 256 N.W.2d 131, 134-135. *In holding that the results of the blood test were admissible, the court explained that **despite the fact the legislature created a specific right of a driver to refuse to submit to a test to determine the alcohol content of his blood, failure to comply with the procedure as set forth in the implied consent statutes does not require suppression of the test results as long as the testing procedure complied with the driver's constitutional rights.*** [emphasis added].

*The Idaho Legislature has acknowledged a driver's physical ability to refuse to submit to an evidentiary test, but it did not create a statutory right for a driver to withdraw his previously given consent to an evidentiary test for concentration of alcohol, drugs or other intoxicating substances.* [emphasis in original].

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OF BREATH TEST**

**Page 4**

*Importantly, the pre-1983 statute, I.C. § 49-352, covering implied consent to extract blood for a blood alcohol test, stated: "If such person having been placed under arrest and having thereafter been requested to submit to such chemical test refuses to submit to such chemical test the test shall not be given but the department shall suspend his license or permit to drive...." The 1984 legislature repealed I.C. § 49-352, the legislative precursor of § 18-8002, and adopted § 18-8002 as a part of the new chapter 80 of title 18. In addition to maintaining the pre-1983 implied consent language and the 1983 deletion of the language just discussed, this enactment added a section making it clear that a driver does not have the right to consult with an attorney before submitting to an evidentiary test. The state submits that the elimination of the statutory provision that the test shall not be given if it is refused, the continued use of the pre-1983 implied consent language, the addition of a specific statutory provision making it very clear that a driver does not have a right to consult with an attorney before submitting to the evidentiary test, along with the statement of purpose enacted as a part of the 1983 Act, reflect the legislative "get tough" policy. This legislative "get tough" policy did not include the creation of a statutory right for a driver to refuse to submit to an evidentiary test requested by an officer who has reasonable cause to believe that such driver is under the influence.*

*The Oregon Supreme Court in State v. Newton, 636 P.2d 393 (1981), explained that the concept of implied consent is a statutory fiction which, at first, appears to be theoretically contradictory.*

The contradiction disappears, however, when it is realized that the words "consent" and "refusal" are not used as antonyms, because they are not used in the same sense. "Consent" describes a legal act; "refusal" describes a physical reality. By implying consent, the statute removes the *right* of a licensed driver to lawfully refuse, but it cannot remove his or her *physical power* to refuse. As another court put it:

The obvious reason for acquiescence in the refusal of such a test by a person who as a matter of law is "deemed to have given his consent" is to avoid the violence which would often attend forcible tests upon recalcitrant inebriates.

**MEMORANDUM IN SUPPORT OF  
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**It is firmly established that a drunken driver has no *right* to resist or refuse such a test [citations omitted in quote].** [emphasis added]. It is simply because such a person has the *physical power* to make the test impractical, and dangerous to himself and those charged with administering it, that it is excused upon an indication of his unwillingness.... Bush v. Bright, 264 Cal.App.2d 788, 790, 792, 71 Cal.Rptr. 123 at 125 (1968) (original emphasis).

Thus refusal as contemplated by the statute is something other than withholding of consent because consent is legally implied. It is a refusal to comply with the consent which has already been given as a condition of a license to drive. The purpose of a warning of license suspension following a refusal ... is to overcome an unsanctioned refusal by threat instead of force. It is not to reinstate a right to choice, but rather to nonforcibly enforce the driver's previous implied consent.

636 P.2d 393 at 397-398 (*original emphasis*). See also State v. Hoehne, 78 Or.App. 479, 717 P.2d 237 (1986); State v. Spencer, 305 Or. 59, 750 P.2d 147 (1988); Pears v. State, 672 P.2d 903 (Alaska App.1983), *rev'd on other grounds*, 698 P.2d 1198 (Alaska 1985); Wirz v. State, 577 P.2d 227 (Alaska 1978).

*The Idaho Legislature has not created a statutory right to refuse to submit to an evidentiary test to determine a driver's blood alcohol level. It is difficult to believe that the Idaho Legislature would provide an individual with the statutory right to prevent the state from obtaining highly relevant evidence when a law enforcement officer has reasonable cause to believe that individual has committed a crime-whether it would be driving under the influence, vehicular manslaughter, sale of controlled substances, or murder. If the driver's constitutional right to be free from unreasonable searches and seizures is complied with, the state should not be prevented from obtaining such relevant evidence as the alcohol content of the driver's blood.*

Even more tellingly, the Court found that

*In Schmerber, the United States Supreme Court recognized that a warrantless seizure of the blood of a driver, as long as probable cause exists and the withdrawal of the blood is done in a*

**MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS RESULTS  
OF BREATH TEST**

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*reasonable fashion, does comply with the provisions of the fourth amendment.*

The Idaho Supreme Court was manifestly wrong in its interpretation of *Schmerber v. California*, 384 U.S. 757 (1966) and has now been overruled by the United States Supreme Court's ruling in *McNeely*. See *McNeely*, *supra*, at \*5.

Now this Court is confronted with what this means for defendants who have been read the Notice of Suspension for Failure of Evidentiary Testing (otherwise known as the ALS form). This form is read by Idaho police to defendants and states

I have reasonable grounds to believe that you were driving or were in physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances. You are required by law to take one or more evidentiary test(s) to determine the concentration of alcohol or presence of drugs or other intoxicating substances in your body. After submitting to the test(s) you may, when practical, at your own expense, have additional test(s) made by a person of your own choosing. You do not have the right to talk to a lawyer before taking any evidentiary test(s) to determine the alcohol concentration or presence of drugs or other intoxicating substances in your body.

The obvious problem with this is that the law requiring those tests is unconstitutional. When the officer does not have a warrant, he may not threaten to do what he is not legally authorized to do. *Bumper v. North Carolina*, 391 U.S. 543, 548-550 (1968); *State v. Smith*, 144 Idaho 482, 488-89 (2007). That threat vitiates any consent. *Id.* The state does not have the power to give implied consent to a search in violation of the Constitution. *Woolery*, 116 Idaho at 372 quoting *Hartman*, 256 N.W.2d at 134-135.

**MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS RESULTS  
OF BREATH TEST**

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In this case, the defendant was read the ALS form. Therefore, his consent was involuntary and the result of the test must be excluded under the Idaho Constitution Article I § 17. *State v. Guzman*, 122 Idaho 981, 995 (1992).

#### IV. CONCLUSION

The defendant respectfully requests that this Court grant his Motion to Suppress the results of the breath test in this case because his consent to the search was involuntary and therefore the test was carried out in violation of his rights under the Constitutions of the United States and the State of Idaho.

DATED this 22 day of April, 2013.

THE LAW OFFICE OF THE PUBLIC  
DEFENDER OF KOOTENAI COUNTY

BY: Jay Logsdon  
JAY LOGSDON  
DEPUTY PUBLIC DEFENDER

**MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS RESULTS  
OF BREATH TEST**

**Page 8**

### CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same as indicated below on the 23 day of April, 2013, addressed to:

Coeur d'Alene Prosecutor FAX 769-2326

       Via Fax

  ✓   Interoffice Mail

Christine Stray

**MEMORANDUM IN SUPPORT OF  
MOTION TO SUPPRESS RESULTS  
OF BREATH TEST**

**Page 9**



**ORIGINAL**

Jay Logsdon, Deputy Public Defender  
The Law Office of the Public Defender of Kootenai County  
PO Box 9000  
Coeur d'Alene, Idaho 83816  
Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 8759

STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
FILED:

2013 MAY -1 PM 2:42

CLERK DISTRICT COURT

DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

**STATE OF IDAHO,**

Plaintiff,

V.

**JESSE CARL RIENDEAU,**

Defendant.

**CASE NUMBER CR-13-0005363**

**Misd**

**MOTION TO SUPPRESS**

COMES NOW, the above named defendant by and through his attorney, Jay Logsdon, Deputy Public Defender, and hereby moves the Court for an Order suppressing any and all evidence gathered against the above named defendant including all statements made by the defendant, the observations made by the officers of the defendant before, during and after the stop, and any evidence seized subsequent to the stop. The evidence must be suppressed because the warrantless stop and arrest by the officers was unlawful and without legal justification, therefore in violation of the Fourth Amendment to the Constitution of the United States and Article I § 17 of the Constitution of the State of Idaho.

Article I Section 17 of the Idaho Constitution affords greater protection than the Fourth Amendment to the United States Constitution based upon the long-standing jurisprudence of the Idaho appellate courts, the uniqueness of the State of Idaho, and the uniqueness of the Idaho

**MOTION TO SUPPRESS**

**Page 1**

Constitution. See *State v. Cada*, 129 Idaho 224 (Ct.App.1996) (Idahoans have higher expectation of privacy in their land); *State v. Guzman*, 122 Idaho 981, 995 (1992) (not the exclusionary rule, but the constitutional provision itself impedes fact-finding function of Court- but this is a “price the framers anticipated and were willing to pay”); *State v. Thompson*, 114 Idaho 746 (1988) (Idahoans have a higher expectation of privacy in the home); *State v. LePage*, 102 Idaho 387 (1981) (judicial integrity mandates exclusionary rule); *State v. Rauch*, 99 Idaho 586 (1978) (admission of illegally seized evidence itself a violation of constitution); *State v. Arregui*, 44 Idaho 43 (1927) (application of exclusionary rule in Idaho 34 years prior to *Mapp v. Ohio*, 367 U.S. 643 (1961)).

Counsel requests that this motion be set for hearing in order to present oral argument, evidence and/or testimony in support thereof. Requested time is 15 minutes.

DATED this   1   day of May, 2013.

THE LAW OFFICE OF THE PUBLIC  
DEFENDER OF KOOTENAI COUNTY

BY:   Jy Logsdon    
JAY LOGSDON  
DEPUTY PUBLIC DEFENDER

### **CERTIFICATE OF DELIVERY**

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same as indicated below on the   1   day of May, 2013, addressed to:

Coeur d'Alene Prosecutor FAX 769-2326

       Via Fax

  X   Interoffice Mail

  Abelingsrang  

**MOTION TO SUPPRESS**

**Page 2**

**ORIGINAL**

Jay Logsdon, Deputy Public Defender  
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PO Box 9000  
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Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 8759

STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
FILED:

2013 MAY -6 PM 2:49

CLERK DISTRICT COURT  
*Amanda McEntee*  
DEPUTY *RM*

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

<b>STATE OF IDAHO,</b>	)	
	)	
Plaintiff,	)	<b>CASE NUMBER CR-13-0005363</b>
	)	<b>Misd</b>
V.	)	
	)	<b>SUPPLEMENTAL MATERIAL FOR</b>
<b>JESSE CARL RIENDEAU,</b>	)	<b>DEFENDANT'S MOTION IN LIMINE</b>
	)	<b>AND MOTION FOR JUDICIAL NOTICE</b>
Defendant.	)	
	)	

---

COMES NOW, the above named defendant by and through his attorney, Jay Logsdon, Deputy Public Defender, and provides the Court and opposing counsel with the following supplemental material in support of his motion for an Order to preclude the prosecuting attorney from introducing into evidence any evidence of the breath test result. The defendant further moves that the Court take judicial notice of these documents under I.R.E. 201.

The following documents are attached and incorporated by reference:

Idaho State Police Forensic Services, Standard Operating Procedure Breath Alcohol Testing, effective date 1/15/2009;

Idaho State Police Forensic Services, Standard Operating Procedure Breath Alcohol Testing, effective date 4/23/2012;

**SUPPLEMENTAL MATERIAL FOR DEFENDANT'S  
MOTION IN LIMINE AND MOTION FOR JUDICIAL  
NOTICE**

**Page 1**

Idaho State Police Forensic Services, Standard Operating Procedure Breath Alcohol Testing, effective date 1/16/2013;

Idaho State Police Forensic Services, Idaho Intoxilyzer 5000 Series Reference Manual, effective date 12/16/2006.

The National Highway Traffic Safety Administration produces a manual for students and instructors used nation-wide to train officers on how to do field sobriety testing. Attached is a copy of a summary of the changes made to the manuals between 2004 and 2006. On page four, the Court will find that the instructor manual was changed to read

*For training purposes, the SFST's are not at all flexible. They must be administered each time, exactly as outlined in this course.*

This change to stricter application of the testing was based on an Ohio Supreme Court opinion. See *id.* It would appear that the National Highway Traffic Safety Administration does not share or support the Idaho State Police's practice of deregulating in the face of officers failing to properly administer testing.

DATED this 6 day of May, 2013.

THE LAW OFFICE OF THE PUBLIC  
DEFENDER OF KOOTENAI COUNTY

BY:

  
JAY LOGSDON  
DEPUTY PUBLIC DEFENDER

**SUPPLEMENTAL MATERIAL FOR DEFENDANT'S  
MOTION IN LIMINE AND MOTION FOR JUDICIAL  
NOTICE**

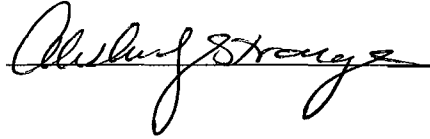
**Page 2**

## CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same as indicated below on the   6   day of May, 2013, addressed to:

Coeur d'Alene Prosecutor FAX 769-2326

       Via Fax  
  X   Interoffice Mail

A handwritten signature in cursive script, appearing to read "Christy Strang", written over a horizontal line.

**SUPPLEMENTAL MATERIAL FOR DEFENDANT'S  
MOTION IN LIMINE AND MOTION FOR JUDICIAL  
NOTICE**

**Page 3**

## **2004 and 2006 Standardized Field Sobriety Testing (SFST) Revisions**

In 2004 and 2005 several workgroups convened at the request of the National Highway Traffic Safety Administration (NHTSA) to review the Standardized Field Sobriety Testing (SFST) curriculum and make needed updates and revisions.

The attached information reflects the revisions completed by the various workgroups. The revisions listed were approved by the International Association of Chiefs of Police (IACP) DRE Technical Advisory Panel (TAP) and implemented into the September 2004 and February 2006 SFST curriculum.

SFST revisions contacts:

### National Highway Traffic Safety Administration (NHTSA):

Dean Kuznieski,  
NHTSA  
Enforcement and Justice Services Division,  
400 7<sup>th</sup> Street, S.W.,  
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E-mail: [Dean.Kuznieski@dot.gov](mailto:Dean.Kuznieski@dot.gov)

Bob Hohn  
NHTSA  
Impaired Driving Division  
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E-mail: [bob.hohn@dot.gov](mailto:bob.hohn@dot.gov)

## SFST Instructor Training Manual

### Administrators Guide

#### ☐ Section E. Guidelines for Controlled Drinking Practices

The fourth paragraph on page 14 deals with volunteers wearing contact lens. Since the wearing of contact lens is no longer a factor in HGN testing, this paragraph was removed.

The fifth paragraph of Section E 2, states that volunteers should be brought to the training facility two hours before the practice session begins. This was revised to read three hours before the practice session begins to allow for proper preparation and alcohol assimilation into the blood stream.

Guidelines for achieving target BAC's, Page 14 Section E-3.

Table for achieving target BAC's was adjusted to target impairment levels at or about 0.13 BAC. The table was also adjusted to include the recommended number of drinks (over a three-hour period) for both men and women based on the following weights:

<u>WEIGHT</u>	<u>MEN</u>	<u>WOMEN</u>
110	5	4
120	6	5
130	6	5
140	7	5
150	7	6
160	8	6
170	8	7
180	9	7
190	9	7
200	10	8
210	10	8
220	10	8
230	11	9
240	11	9
250	12	10

The last sentence in the first paragraph on page 15 was deleted. This change was made to help minimize the chances of volunteers getting sick due to drinking too fast.

Page 17 second paragraph was revised to read that only the IACP/NHTSA Option tapes are approved for the SFST instruction.

## SFST Instructor Training Manual

### ☐ Session I: Introduction and Overview

Definition of Vertical Gaze Nystagmus was revised in Glossary of Terms to be consistent with the DRE definition.

### ☐ Session II: Detection and General Deterrence

Page II-1, Part A, 2.b. was revised to reflect most current FARS data. Revised to read, **"In 2002, alcohol related fatalities rose to 17,419, representing 41 percent of all traffic fatalities."**

Added an Instructor's note to reflect, **"NHTSA 2002 FARS data."**

PowerPoint slide II -2 was revised to reflect new data.

PowerPoint II -6 was revised to read:

**"In 2002, alcohol was involved in approximately 41 percent of all fatal crashes, 9 percent of all reported injury crashes and 6 percent of all crashes. Fifty-four percent of all fatal crashes on weekends were alcohol related."**

**"These alcohol related fatalities represent an average of one alcohol-related fatality every 30 minutes. Based on the most current cost data available, these alcohol-related fatalities cost society approximately \$54 billion in lost productivity, medical expenses, property damage and other related expenditures."**

Page II-20, Subpart 3., Dose-Response Relationships, subpart a. (4) & (5). Part (4) was revised to reflect 0.08 BAC and revised to read: The so-called **"illegal limit"** of BAC is 0.08 in all states.

PowerPoint II -23 was revised to reflect .08 BAC.

Section 3 a (5) on page II-20 was also revised to reflect the 0.08 reference. Section will now read **"If a person has a BAC of 0.08 it means there are 0.08 grams of pure ethanol in every 100 milliliters ("percent") of his/her blood."**

Added instructor note: The term **"percent"** is sometimes informally used because the concentration is determined in units of one hundred.



However, instead of being a "true" percent, the actual units are measured in mass (grams) of ethanol per volume (milliliters) of blood.

Subpart 3., b., page II-20, was revised to reflect the 0.08 reference.

Subpart 3., b. (3) was revised to reflect 0.08 reference to read: "It is estimated that a person would have to consume four cans of beer, four glasses of wine or four shots of 80-proof whiskey in a fairly short period of time to reach a BAC of 0.08."

To clarify the statement in b. (3) an Instructor's Note was added to read, "Remind students of the numerous factors which determine actual BACs, (i.e., sex, weight, height, etc.)."

Subpart 3., b. (6) was revised to reflect 0.08 to read: "If one of the shot glasses was filled with pure ethanol and the other half-filled, there would be enough of the drug to bring an average man's BAC to 0.08."

#### ☐ Session III: The Legal Environment

The Instructor's Note on page III-14, opposite 7 b. was revised to read: "For training purposes, the SFST's are not at all flexible. They must be administered each time, exactly as outlined in this course."

Added 7 c to read; "This decision was based upon an older edition of this manual and was a strict interpretation by the court."

Also added Instructor Note across from 7 c. to read: "Regarding Homan and State vs. Schmitt, 101 Ohio St 3d 19, 2004."

Attachment A at the end of Session III entitled "Horizontal Gaze Nystagmus State Case Law Summary" was updated by the National Traffic Law Center.

#### ☐ Session IV: Overview of Detection, Note Taking and Testimony

No revisions

#### ☐ Session V: Phase One – Vehicle In Motion

Added instructor note to page V-12, in Part E in the Typical Reinforcing Cues of the Stopping Sequence, opposite item 2 in the instructor's column that addresses the fleeing operator (as noted on slide V-8).

The Instructor's note added was **"Point out here the dangers inherent with fleeing operators. If time allows, review agency's pursuit policy."**

PowerPoint slide V-9 was corrected to read: **"Phase One: Task Two."**

☐ **Session VI: Phase Two – Personal Contact**

No revisions

☐ **Session VII: Phase Three – Pre-Arrest Screening**

The Section on Gaze Nystagmus, Horizontal Gaze Nystagmus – Definition, Concepts and Demonstration(Parts C and D) were moved forward, becoming Parts B and C. Part B., Divided Attention Tests: Concepts, Examples, Demonstrations were moved to Part E. Parts A, F & G remain the same.

The restructuring of this section puts the introduction to HGN section first to be consistent with other Sessions (i.e. VIII) and the standardization concept.

The order of the PowerPoint slides for this Session were also revised to coincide with the changes mentioned above.

Added Instructor Note at the end of Section C to suggest the showing of the video entitled, **"The Truth Is In the Eyes"** (8 minutes and 50 seconds).

☐ **Session VIII: Concepts and Principles of the SFST's**

Page VIII-5, C., Horizontal Gaze Nystagmus, 1.,b., (first bullet), the word "usually" was deleted and replaced with **"generally"**

PowerPoint slide VIII-10 the two asterisks after Horizontal Gaze were deleted since there is no reference.

Page VIII-7, Section C 3d, an Instructor Note was revised to include current research on positional alcohol nystagmus. The revised Instructor Note reads; **"In the original HGN study, research was not conducted for performing HGN on people lying down. Current research demonstrates that HGN can be performed on someone in this position." "See Attachment A, page 5, #33, "Nystagmus Testing in Intoxicated Individuals.""**

References to PAN I and Pan II were moved into the instructor notes section. Page VIII-10, 3e, the new definition of Vertical Gaze Nystagmus was added .

Page VIII-10, under Vertical Gaze Nystagmus (second bullet), the word "produce" was changed to **"cause."** Also, in the instructors note opposite Vertical Gaze Nystagmus, the word "induce" was changed to **"cause."**

Page VIII-13, 5., in the Administrative Procedures for Horizontal Gaze Nystagmus, the second paragraph was revised to read: **"It is important to administer the Horizontal Gaze Nystagmus test systematically using the following steps to ensure that nothing is overlooked."**

An Instructor's Note was added opposite this paragraph which reads, **"There are 10 steps in the systematic administration of the Horizontal Gaze Nystagmus test."**

Page VIII-13, Section 5 a., the words **"Step I: Check for eyeglasses"** were added. In 5 b., the words **"Step II: Verbal Instructions"** were added.

Page VIII-14, in Section 5 c., the words **"Step III: Positioning the Stimulus"** were added. In 5 d., the words **"Step IV: Equal Pupil Size and Resting Nystagmus"** were added. In 5 e., the words **"Step V: Tracking"** were added. In Section 5 f., the words **"Step VI: Lack of Smooth Pursuit"** were added. In Section 5 g., the words **"Step VII: Distinct and Sustained Nystagmus at Maximum Deviation"** were added.

Page VIII-15, Section 5 h., the words **"Step VIII: Onset of Nystagmus Prior to 45 Degrees"** were added. In Section 5 i., the words **"Step IX: Total the Clues"** was added. In Section 5 j., the words **"Step X: Check for Vertical Nystagmus"** were added.

The Instructor's Note directing the instructor to place different sized coins on an overhead projector, which had been on page VIII-13 was removed.

PowerPoint Slide VIII-11 was changed to reflect changes made.

Page VIII-16, the Instructor Note across from Section 6 a was revised to read: **"It is important that students start with the subjects left eye first. Then check the right eye for the same clue. This procedure should be used for all three clues."**

Instructor Note across from Section 6 b was revised to direct the instructors to remind the students to check each eye twice for each clue.

Page VIII-17, the word "testing" was replaced with **"checking"** in 6 d.

Page VIII-17, the analogy of windshield wipers going across a wet windshield was added to the instructor notes addressing smooth pursuit.

Page VIII-18, first bullet in (1) was revised to read: **"It is necessary to move the object smoothly in order to check the eyes ability to pursue smoothly."**

Page VIII-22, in the first bullet in Section f., the words "the test of" were replaced with **"check for."**

Page VIII-34, opposite the bullets on administering VGN, an instructor's note was added which reads: **"Remind students to make two checks for Vertical Nystagmus."**

Page VIII-42, the instructors note section across from 8 h (first bullet), which read "If suspect can't do test record as if all eight clues were observed" was revised to read: **"If suspect can't do the test, record observed clues and document the reason for not completing the test, e.g. suspect's safety."**

Page VIII-50, Section G 8(h) in the instructors note section which read, "Record as if all four clues were observed" was revised to read, **"If suspect can't do the test, record observed clues and document the reason for not completing the test, e.g. suspect's safety."**

Page VIII-58, an instructor note was added across from section d to read: **"Instruct students to place a letter "M" at bottom of vertical line to indicate missed heel to toe."**

Page VIII-64, in the "Test Your Knowledge" examination, in questions #4, #9 and #13, the words **"Per the original research"** were inserted at the beginning of the questions.

PowerPoint slides VIII-21 and 25 were revised to reflect the scoring revisions to the Walk & Turn and One Leg Stand tests.

Attachment to Session VIII was updated to include the following studies:

1. **"Nystagmus Testing in Intoxicated Individuals" – November 2003, by Citek, Ball and Rutledge.**

**2. "The Robustness of the Horizontal Gaze Nystagmus (HGN) Test" - 2004, U.S. Department of Transportation.**

☐ **Session IX: Test Battery Demonstrations**

No revisions

☐ **Session X: Dry Run Practice Sessions**

Added a reference to check for resting nystagmus to Step 2 of the Student Proficiency Examination form. (Attachment A).

☐ **Session XI: Testing Subjects Practice – First Session**

No revisions

☐ **Session XI-A: Testing Subjects Practice – First Session (Options)**

Added the BAC results and SFST scoring clues for each of the volunteer drinkers.

☐ **Session XII: Processing The Arrested Suspect and Preparation For Trial**

No revisions

☐ **Session XIII: Report Writing and Moot Court**

No revisions

☐ **Session XIV: Testing Subjects Practice – Second Session**

No revisions

☐ **Session XIV-A: Testing Subjects Practice – Second Session (Option Two)**

Added the BAC results and SFST scoring clues for each of the volunteer drinkers.

☐ **Session XV: Review and Proficiency Examinations**

Page XV-1, A, 1., c. revised to read, "Nystagmus is caused by alcohol and/or other drugs and some medical conditions."

Page XV-2, added an instructor note opposite 5.d., to read: **"Remind students to conduct a second pass the same as the first."**

Page XV-3, added an instructor note opposite 6.g., to read: **"Remind students to conduct a second pass the same as the first."**

Page XV-4, added an instructor note opposite 8.c., to read: **"Based on the original research."**

Page XV-6, added an instructor note opposite 4.c., to read: **"Based on the original research."**

Page XV-7, added an instructor note opposite 4.c., to read: **"Based on the original research."**

PowerPoint slides XV-10 and XV-14 were revised to reflect the scoring changes for the Walk and Turn and One Leg Stand tests.

In Attachment A, the Student Proficiency Examination, the word **"repeat"** was placed in brackets and entered after Item #3. (Checking for equal tracking).

#### ☐ **Session XVI: Written Examination and Program Conclusion**

The DWI Detection and Standardized Field Sobriety Testing Post-Test was changed to Attachment A.

The DWI Detection and Standardized Field Sobriety Testing Remedial Test was changed to Attachment B.

Question 11, page 2 of the Remedial Test was revised along with the attached answer sheet to reflect the scoring changes for the Walk and Turn Test.

### **SFST Student Training Manual**

#### ☐ **Session I: Introduction and Overview**

Revised definition of Vertical Gaze Nystagmus in the Glossary of Terms attachment to: **"An up and down jerking of the eyes which occurs when the eyes gaze upward at maximum elevation."**

☐ **Session II: Detection and General Deterrence**

Page II-1, the first paragraph last sentence was revised to reflect most current Fatal Accident Reporting System (FARS) data. Revised to read, "In 2002, alcohol related fatalities rose to 17,419, representing 41 percent of all traffic fatalities. (NHTSA 2002 FARS data)"

Page II-17 Dose-Response Relationships section, the first paragraph was revised to reflect 0.08 BAC information. Added: "If a person has a BAC of 0.08 it means there 0.08 grams of pure ethanol in every 100 milliliter ("percent") of his/her blood."

☐ **Session III: The Legal Environment**

Page III-9 Ohio v. Homan was changed to read: "State v. Homan."

Page III-10, under State v. Homan, added two sentences at the end of the first paragraph to read: "This decision was based upon an older edition of this manual where an ambiguous phrase was strictly interpreted by the court. The phrase in question only applied to the use of the SFST's for training purposes."

Attachment A at the end of Session III entitled "Horizontal Gaze Nystagmus State Case Law Summary" was updated by the National Traffic Law Center.

☐ **Session IV: Overview of Detection, Note Taking and Testimony**

The DWI Investigation Field Notes form (Page IV-11) was revised to include Vertical Nystagmus under IV. (Also revised in all other sessions where the Field Investigation form is provided).

☐ **Session V: Phase One – Vehicle In Motion**

No revisions

☐ **Session VI: Phase Two – Personal Contact**

No revisions

☐ **Session VII: Phase Three – Pre-Arrest Screening**

The section on Nystagmus and Divided Attention Tests were revised to reflect Nystagmus first followed by the Divided Attention tests. The definition of

Vertical Gaze Nystagmus (VGN) on Page VII-6, last paragraph, was revised to reflect the new definition. The restructuring of this section makes the testing sequence consistent with other sessions and reinforces standardization.

□ **Session VIII: Concepts and Principles of the SFST's**

Page VIII-4 section 2 (2), the explanation of Vertical Nystagmus was revised to follow the new definition.

Page VIII-5 under "Procedures to Assess Possible Medical Impairment", a reference to checking for Resting Nystagmus was added.

Page VIII-5, section 2, the words **"and Sustained"** were added after the word "Distinct." "Sustained" was also added following word "distinct" in second sentence.

Page VIII-6, the last two paragraphs were revised to reflect the proper sequence of the medical checks prior to checking for the three clues of HGN.

Page VIII-7, second paragraph, added word **"sustained"** after word "distinct" in first sentence.

Page VIII-7, the box containing the administrative procedures for conducting the HGN test was changed to reflect the revised 10 step procedure.

Page VIII-9, Procedures for Walk and Turn Testing, 1. Instruction Stage, fourth instruction bullet was revised to read: **"Maintain this position until I have completed the instructions."**

Page VIII-11, first paragraph following section H was revised to include new scoring for the Walk and Turn Test. Revised to read: **"If suspect can't do the test, record observed clues and document the reason for not completing the test, e.g. suspect's safety."**

Page VIII-12, section 2, first bullet of the instructions was revised to read: **"When I tell you to start, raise one leg, either leg, with the foot approximately six inches off the ground, keeping your raised foot parallel to the ground."**

Page VIII-13, section 3, the note following D was revised to read: **"If suspect can't do the test, record observed clues and document the reason for not completing the test, e.g., suspect's safety."**



Page VIII-13, second paragraph under "Note" was revised to include the words: **"Based on original research."**

Page VIII-14, words **"and sustained"** were added to the Horizontal Gaze Nystagmus box.

Page VIII-17, the last sentence that made reference to recording eight clues if a person cannot complete the Walk and Turn Test was removed.

Page VIII-19, the last sentence which made reference to recording four clues if a person cannot complete the One Leg Stand Test was removed.

Page VIII-20, questions #4, #9 and #13 in the "Test Your Knowledge" section were revised to include the words **"Per the original research."**

Attachment B, "Scientific Publications and Research Reports Addressing Nystagmus" two new research papers; 1) **"Nystagmus Testing in Intoxicated Individuals"**, Citek, Ball and Rutledge, 2003., and 2) **"The Robustness of the Horizontal Gaze Nystagmus (HGN) Test"**, U.S. Department of Transportation, 2004 were added.

☐ **Session IX: Test Battery Demonstrations**

No revisions

☐ **Session X: Dry Run Practice Sessions**

Page X-3, added a reference to check for Resting Nystagmus in step #2.

☐ **Session XI: Testing Subjects Practice – First Session**

No revisions

☐ **Session XI-A: Testing Subjects Practice – First Session (Options)**

No revisions

☐ **Session XII: Processing The Arrested Suspect and Preparation For Trial**

No revisions

☐ **Session XIII: Report Writing and Moot Court**

No revisions

☐ **Session XIV: Testing Subjects Practice – Second Session**

No revisions

☐ **Session XIV-A: Testing Subjects Practice – Second Session (Option Two)**

Added a reference to check for resting nystagmus in Step #2 of the Student Proficiency Examination form on Page XIV-3.

☐ **Session XV: Review and Proficiency Examinations**

Added a reference to check for Resting Nystagmus in Step 2 of the Student Proficiency Examination form (Attachment A, page 1).

☐ **Session XVI: Written Examination and Program Conclusion**

☐ **Introduction to Drugged Driving**

Page 3, section 3, Frequency of Drug Use; revised drug use data in last two paragraphs to include current Substance Abuse and Mental Health Services Administration (SAMHSA) data.

Page 4, included update drug use data from the National Household Survey on Drug Abuse (NHSDA).

Page 5, section B, added "Resting Nystagmus" as first bullet in first paragraph. Added definition and explanations of resting nystagmus under the bullets.

Pages 5 through 10, replaced the words "usually will" with the word "generally" when describing the effects of various drug categories.

Page 6, added explanation of early angle of onset of nystagmus under the PCP bullet. Also added reference to "Resting Nystagmus."

Section 3 – Hallucinogens; action revised to read: "Hallucinogens are drugs that affect a person's perceptions, sensations, thinking, self awareness and emotions." Also added to drug charts at end of the session.

Added the revised definition of hallucinogens from the Random House College Dictionary (Revised Edition, 1980).

Section 5 – Narcotic Analgesics; added OxyContin to list of examples.

Section 7 – Cannabis; added **“Reddening of Conjunctiva”** to list of general indicators. Also added to the drug charts at end of session.

Section D – Drug Combinations; revised the definition of “polydrug use” in the second paragraph to read: **“Polydrug use is defined as using two or more drugs at the same time”** making the definition consistent with DRE.

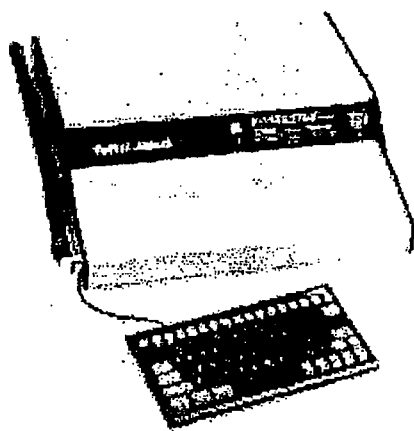
Section D – Drug Combinations; revised the definitions of Null Effect, Overlapping Effect, Additive Effect and Antagonistic Effect to coincide with the DRE definitions.

CEH  
5-04-06

# **Idaho**

# **INTOXILYZER 5000 Series**

# **Reference Manual**



Idaho Intox 5000 Reference Manual  
Issuing Authority---ISPFS Quality Manager  
Revision 1 Effective 12/16/2010  
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## History Page

Revision #	Effective date	History
	8/1/1999	New Manual (original issue)
0	8/20/2010	New formatting and procedural language
1	12/16/2010	Internal parts theory section H-12 changed to read Idaho Breath Alcohol Standard Operation Procedure instead of SOP III

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## Scope:

Idaho State Police (ISP) has authority and responsibility in the state of Idaho for the calibration and certification of instruments, maintenance of instrumentation, quality control guidelines, and analytical methods pertaining to the evidentiary collection of breath alcohol samples. Idaho State Police Forensic Services (ISPFS) is the functional unit within ISP that is authorized to administer the Breath Alcohol Testing Program.

Analytical Methods (AM), also known as Standard Operating Procedures (SOP), shall supersede and take legal precedent over any and all other forms of documentation (e.g. reference manuals, training manuals, and training materials) produced or maintained by the Idaho State Police as it pertains to the Breath Alcohol Testing Program in the state of Idaho. If discrepancies exist between differing forms of procedural documentation, the Analytical Method shall be the binding document.

The reference manuals produced and maintained by ISPFS are for reference only as it pertains to the form and function of the different breath alcohol testing instruments used within the state of Idaho. If questions arise as to the functionality of the instrument, the reference manual may be used to help answer those questions. The reference manual is a reference tool used by the end user agency to help the Breath Testing Specialists and Operators maintain knowledge as to the functionality of the instrument and to refresh their memories as to the different functions and options within the different instruments.

## Breath Testing Specialists Responsibilities:

The Breath Testing Specialist (BTS) should have a good knowledge of the Breath Alcohol Program and the operation of the Intoxilyzer 5000 Series. It will be the responsibility of the BTS to oversee the Breath Alcohol Program within his/her agency.

The BTS will be responsible for:

- a) Record management and retention
- b) Maintenance and functioning of the instrument
- c) Maintenance and functioning of the simulator
- d) Teaching and certifying operators in the proper use of the Intoxilyzer 5000 Series
- e) Testifying in court to your responsibilities and duties

This reference manual is designed to assist the BTS in their duties. However, if at any time questions arise, call the lab that has jurisdiction over your area (see [ISPFS Website](#)).

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615 W Wilbur Ave, Suite B  
Coeur d'Alene, Id 83815

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FAX NUMBER: 209-8612

POCATELLO LAB  
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Pocatello, Id 83201

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## **Safety:**

Chemicals, reagents, and solutions used within the scope of the breath testing program should be handled with caution to avoid loss, spillage, contamination, and damage of the instrumentation. When any electrical instrument is used around and in conjunction with liquid solutions and reagents, extreme caution should be taken to avoid damage due to short circuits and injury due to electrical shock.

Officers should be aware that pertinent safety information may exist in an instrument operation manual or in the Material Safety Data Sheet (MSDS) for a chemical, reagent, or solution.



## INTOXILYZER 5000 Series

### SUGGESTED PERFORMANCE VERIFICATION PROCEDURES:

The Intoxilyzer 5000 has different performance verification options which can be controlled by its switch settings. It is required to perform a performance verification with each evidentiary breath test. Listed below are the instructions for setting up the Intoxilyzer 5000 to perform a performance verification, as well as the instructions to perform other types of checks. These other types of checks may be used during periodic maintenance as deemed necessary.

#### Recommended procedure for setting up the Intoxilyzer 5000 to perform a performance verification with each breath test

1. Pour the performance verification solution into the simulator, plug it in, and allow the solution to warm for approximately 15 minutes to the proper temperature.

**WARNING:** The simulator must contain liquid when it is plugged into an electrical outlet or the simulator will burn out.

2. Connect the simulator to the Intoxilyzer 5000. The "vapor out" port of the simulator should be connected to the "vapor from simulator" port on the right side (not rear) of the Intoxilyzer. If the simulator is incorrectly connected, the 5000 may be flooded and put out of service.
3. To utilize vapor recirculation connect the "simulator return" port on the right rear of the Intoxilyzer 5000 to the simulator breath inlet.
4. Set mode switches 1,2,3 and 11 on (up).
5. Use <Escape> <Escape> <X> on the keyboard.
6. Answer all of the following questions and press enter/return to store the information. It is critical that the following parameters be entered correctly. Failure to enter any of these parameters correctly may result in the unnecessary disapproval of the breath test(s) performed.
  - a. Low Ref Value: This is the lowest acceptable value that will still be considered as valid for a performance verification check. This number must be entered as 4 digits (e.g. 0.070). This value will be obtained from the Certificate of Analysis for each lot.
  - b. High Ref Value: This is the highest acceptable value that will still be considered as valid for a performance verification check. This number must be entered as 4 digits (e.g. 0.090). This value will be obtained from the Certificate of Analysis for each lot.
  - c. Reset Count Y/N/V: This allows you to reset the counter. The counter increases by one every time the simulator solution is analyzed by the instrument. (Y) resets the counter, (N) does not reset the counter, and (V) lets you view the counter.
  - d. Solution Lot #: This entry is for the solution lot number. This entry requires ten alphanumeric characters (i.e. Lot # 98801 must be entered as 0000098801).
7. The instrument is now set to perform a performance verification check with each breath test.

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**Recommended procedure for performing a performance verification via the simulator port**

1. Set mode switches 1,2,3,4,5 and 11 on (up). Switch 4 puts the instrument in the three-digit mode used for performance verification checks, or on the 5000EN, Use <Escape> <Escape> <W> on the keyboard and answer yes to "3 DIGITS ON?" and "PRELIM RES?"
2. Use <Escape> <Escape> <C> on the keyboard to begin the sequence. The instrument will run the solution twice and printout the results.
3. If the performance verification check does not produce valid results follow the trouble shooting guide in the analytical method/standard operating procedure.
4. Retain a record of the results.

**Recommended procedure for performing a performance verification via the breath tube**

1. Set mode switches 1,2,3,4,5 and 11 on (up). Switch 4 puts the instrument in the three-digit mode used for performance verification checks, or on the 5000EN, Use <Escape> <Escape> <W> on the keyboard and answer yes to "3 DIGITS ON?" and "PRELIM RES?"
2. With the simulator unhooked from the instrument use <Escape> <Escape> <B> on the keyboard to begin the sequence.

**Warning:** Do not have the simulator hooked up to the breath tube during an air blank. The sucking action may pull the solution into the instrument and the Intoxilyzer 5000 may be flooded and put out of service.

3. Follow the instructions on the display:
  - a) Insert a card if and external printer is not being used.
  - b) Enter your last name (up to 20 letters)
  - c) Enter your first name (up to 20 letters)
  - d) Enter your middle initial
  - e) Enter your ID Number (number w/o dashes)
  - f) Enter the solution 1 or 2 (1a, 1b, or 2)
  - g) Review data Y/N (Yes starts you back at step (2), No continues on with the performance verification check.)

NOTE: The solution number referred to in 'f' above is not important at this time. Its purpose is to distinguish which solution is run through the breath tube when more than one solution is used to perform this type of performance verification check.

4. The instrument will obtain an air blank.
5. The message "Please blow/R into mouthpiece until tone stops" will scroll across the display and then "Please Blow/R" will flash on the display. At this point attach the breathtube to the vapor out port of the simulator and blow into the mouthpiece for approximately five seconds.
6. Unhook the simulator from the breath hose immediately following the displayed readout, displayed as subject test ####.
7. Repeat steps 2-4.
8. Retain a record of the results.

## Proper Connection of the Simulator

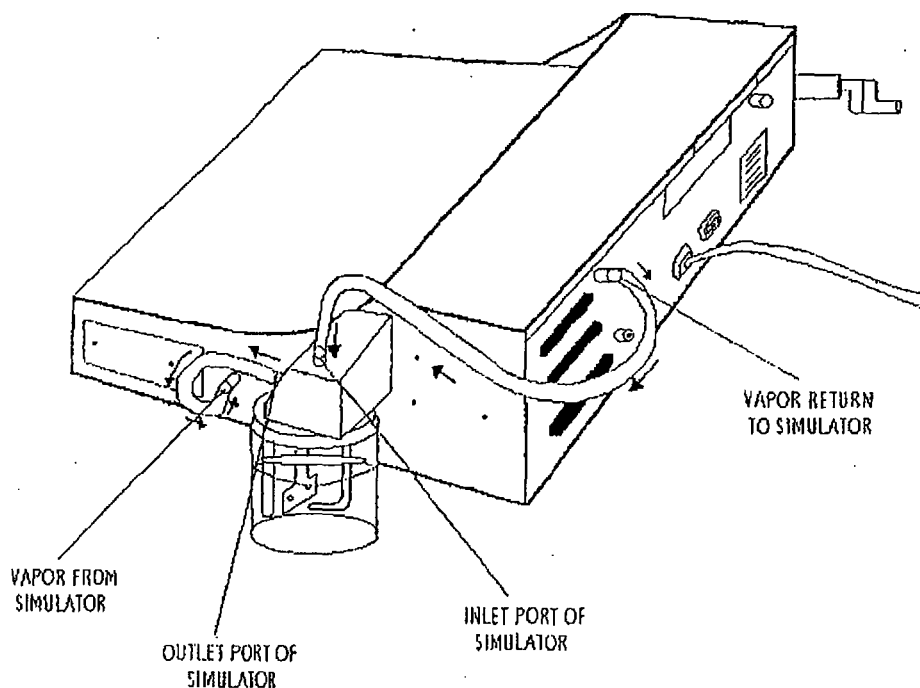
The proper connection of the simulator is important. If the simulator is not connected properly, the Intoxilyzer 5000 series may draw solution into the chamber and flood the instrument.

To properly connect the simulator to the Intoxilyzer 5000 series attach a 1/4 inch (inside diameter) piece of tubing from the vapor out port on the simulator to the simulator vapor port on the side of the Intoxilyzer 5000 series. Use the shortest section of tubing possible.

Next, connect another 1/4 inch piece of tubing from the right rear of the Intoxilyzer 5000 series, labeled simulator return on the instrument, to the vapor in port on the simulator.

**Do not connect the inlet port of the simulator to the port on the left rear of the instrument labeled pump EXHAUST/SAMPLE CAPTURE and BREATH EXHAUST.**

The diagram below illustrates the proper hookup with a Guth or a Mark IIA simulator.



## KEYBOARD OPTIONS MENU

Diagnostic and set up functions can be accomplished through the Keyboard Options Menu, commonly known as the Escape Escape Sequence. The Intoxilyzer 5000BN does not have switches to control functions like the previous Intoxilyzer 5000. All of the functions are controlled through the keyboard options menu.

To enter the Keyboard Options Menu, press the ESC key twice in rapid succession. It may take a few attempts to get the instrument to recognize the ESC ESC command. The timing is critical for this keystroke. This was done deliberately to help prevent an unauthorized operator from inadvertently activating the menu.

### Keyboard Options Menu

Press the ESC button twice very quickly to view the keyboard options menu. To make a selection from the menu, press the associated letter followed by the ENTER key.

Display: Menu #1: 1 B,C,D,E,G,H,P,V,W,Q

Menu #2: 2 A,I,J,K,M,S,U,X,Q

#### ON THE FIRST MENU:

1

B = Maintenance Check

C = Performance Verification Check

D = Diagnostic

E = Preliminary Data Entry

G = Calibration Standard

H = DVM Mode

P = Print Test

V = Version Display

W = Instrument Function Setup

#### ON THE SECOND MENU:

2

A = Continuous Air Blank

I = Internal Standards

J = Memory Full Check

K = Flow Rate Calibration and Testing

M = Communications Select

S = Motor Speed

U = Cell Temperature Setup Function

X = Solution Setup Function

Q = Quit Menu

## ESCAPE ESCAPE MENU FUNCTIONS

- A Auto Purge. This function is used to purge the chamber of any vapor or fluid that may enter the instrument.
- B Performance verification check via the breath hose. See the suggested procedure for performing a check through the breath hose.
- C Performance verification performed via the simulator port. See the suggested procedure for performing a check through the simulator port.
- D Will perform diagnostic check.
- E Preliminary Data Entry Allows you to edit the time, date, location of the instrument and to select the question asked at the end of the testing sequence. For instruments with external printers, you are able to select the number of copies of the breath test results to be printed. As each prompt appears there are two courses of action. Either type in the new data or press ENTER when the proper data is on the display to store it in memory.

Note: While performing a breath test a series of questions is asked of the operator. If the operator answers yes to the question "DUI arrest Y/N", a second question will be asked immediately following the breath test.

"ENTER TIME HHMM" (Set time using 24 hour clock)

"NORM TIME ZONE =" (example MST)

"Date = MMDDYYYY" (Set date)

"INSTR LOCATION =" (Set location)

"H FOR HELP (1,2,3)" (This option sets the question asked at the end of subject test if the operator answers yes to the question

"DUI ARREST Y/N". 1 = DECP Y/N

2 = DRUG TEST Y/N

3 = NONE

In Idaho choose selection 2.

"NUM COPIES (1-3)" (This option is for the use of external printers and can be set to print form 1-3 copies. For internal printers choose 1.)

"TIMEOUT IN MIN =" (This number determines how many minutes of inactivity are necessary before the instrument goes into STANDBY MODE. An entry of ZERO (0) will force the instrument to always stay on. The allowable range of time for this option is 1 to 255 minutes. The simulator is not programmed to go into

STANDBY MODE and will stay on any time there is power to the instrument.)

- G** Barometric Menus This option allows you to choose between wet bath and dry gas calibration. Dry gas is not being used in the State of Idaho. Instrument prompts "SELECT, MAINT (S,M)"

"S" – Select

The instrument will prompt "TYPE GAS, WET (G,W)"

"G" -Dry Gas

"W" -Wet Bath

"M" -Maintenance

The instrument will prompt "DISP,CAL,PNT (D,C,P)"

"D" -Display the current barometric pressure

"P" -Print the current barometric calibration

"C" -Instrument prompts to "ENTER BAROMETRIC" to perform one point calibration on the barometric sensor.

"Q" -Quit

Note: The Maintenance options are not needed. We are only using the wet bath performance verification check.

- H** DVM Test: This is a special diagnostic tool to help a technician check the instrument for drift and stability.

In this mode, the processor output from each of the five filters appears one at a time on the display. The display will show the output YY X VVVV NNNN where:

- YY--indicates which mode the instrument is in.

CH indicates DVM mode

IN indicates internal standards

- X--is the channel number
- VVVV--is the value of the channel
- NNNN--is the noise figure for the channel

The value displayed is the value from the analog to digital converter. The noise figure gives a representation of performance of the channel. The noise figure is the difference between the maximum and minimum of 30 individual samples. Noise figures above 60 will fail the stability tests.

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- I    Internal Standards This option allows you to check the instrument's internal standard values. The value of each of the five internal standards is printed individually on the card.
- J    Memory Full Check When the memory full option is active (Y), the instrument will warn the operator when the memory is almost full and disable the instrument if the memory becomes full. This would allow for a communications download of the data without losing any data. When this option is not active (N), the instrument will still record the test records as before. However, when the instrument is out of space, it will begin to delete the oldest record to make room for the newest entry. Until we are downloading information on a regular basis, leave this option turned off (N).
- K    Flow Rate Calibration and Testing This option allows the technician to monitor volume and flow measurements. If you choose this option, press the START TEST button to exit.
- M    Communication Select This option allows you to choose the communication interface with the instrument. It will prompt "MODEM OR DIRECT". Select "M" for modem so that ISPFS can contact the instrument.
- P    Will perform a print test
- V    Will display the version of the software you are currently using.
- X    Allows you to set the parameters for performing a performance verification check with each breath test. For more information see the procedure on performing a performance verification with each breath test (Page 6).



W Custom Function Setup This option replaces the switch settings that were on the previous Intoxilyzer 5000. The function of the instrument is controlled by answering a series of eleven questions.

- **“STD TEST (1-5)?”** The Intoxilyzer 5000EN is capable of running five different breath test sequences. **For evidentiary DUI testing use choose sequence 1, which is the custom sequence for the State of Idaho.**
  1. Custom test (AIACABABA)
  2. ABA
  3. ABACA
  4. ACABA
  5. ABABA
- **“CUSTOM TEST? Y/N”** The instrument will confirm the test sequence you want to use. Type Y or N.
- **“3 DIGITS ON? Y/N”** This question is asking how many digits the alcohol concentration should be displayed in. **For evidentiary use, we recommend this option be turned on (Y),** this will print three digits past the decimal point (.000). When you use the keyboard options to do a performance verification check, this should be turned on to print all three digits (.000).
- **“PRELIM RES? Y/N”** This allows you to see the alcohol concentration throughout the entire test, not just the final result. The display will continually show the rising, falling or constant concentration value of the sample as the subject blows. **For evidentiary testing this should be turned off (N),** so only the final result is displayed.
- **“DATA ENTRY? Y/N”** The instrument is programmed with a set of data entry questions that may be asked before each breath test begins. These questions include the subject’s name and operator’s name. **For evidentiary testing turn this option on (Y).**

Note: Only when data entry is turned on will test results be stored on the battery protected memory.

- **“PRINT INHIB? Y/N”** It is possible to inhibit the printer from creating a printed record of the breath test. Choose “Y” if you do NOT want the instrument to print a test record. Choose “N” if you DO want the instrument to print a test record. **For evidentiary testing this should be turned off (N)** so that a test record is printed. If a record is not printed use the function key F1 on the keyboard to reprint the results of the last test.
- **“INT STDS? Y/N”** This option performs an internal standards check in place of the performance verification check. For evidentiary testing this needs to be turned off (N) so that a performance verification check is run during the test sequence.
- **“PRINT VOLUME? Y/N”** The expired breath volume can be printed with each breath test. **For evidentiary testing this should be turned off (N)**. We are not currently using this feature.
- **“AUTO TEMP CK? Y/N”** Allows the instrument to obtain temperature information from a compatible Guth simulator automatically. “SIMULATOR TEMPERATURE IN RANGE” will print on the report. **For evidentiary testing this should be turned on (Y) if possible**. If a compatible simulator is not being used or this feature is for some reason not functioning it can be turned off. If it is turned off (N), the question “SIM IN RANGE Y/N” will be asked before each performance verification check.
- **“REVIEW SETUP? Y/N”** If you are satisfied with the setup, choose “N”. If you would like to double-check your entries, choose “Y”.
- **“SAVE SETUP? Y/N”** Answering “Y” to this question will save your new configuration onto the battery backup RAM. This will preserve the configuration so that each time that the instrument is energized, it will be set to your new configuration.

## RECOMMENDED INSTRUMENT SETUP FOR EVIDENTIARY TESTING

<u>QUESTION</u>	<u>RESPONSE</u>
"STD TEST (1-5)?"	1
"CUSTOM TEST? Y/N"	Y
"3 DIGITS ON? Y/N"	Y
"PRELIM RES? Y/N"	N
"DATA ENTRY? Y/N"	Y
"PRINT INHIB? Y/N"	N
"INT STDS? Y/N"	N
"PRINT VOLUME? Y/N"	N
"AUTO TEMP CK? Y/N"	Y

**Q** Quits the <Escape> <Escape> functions and takes the Intoxilyzer back to its resting display.

### SWITCH SETTINGS for the INTOX 5000 66 Series

<u>Switch Number</u>	<u>Function</u>	<u>Off Position</u>
1	Display test	Down
2	D.V.M. test	Down
3	Used with switch 1 & 2 to set mode	
4	Displays 4 digits	Down
5	Displays readout during breath test/cal check	Down
6	Not used in Idaho	
7	Runs the Internal Standards	Down
8	Not used	
9	Will perform a performance verification check	Down
10	Not used in Idaho	Down
11	Use keyboard to input data for the question series	Down
12	Not used in Idaho	Down
13	Disables the printer	Down
14	Not used in Idaho	Not Applicable
15	Not used in Idaho	Not Applicable

#### Useful switch settings

#### Action

1,2,3,4,7,9 & 11 up

Will perform a check on the internal standards when the green START BUTTON is pushed.

2, 7 up

Enters D.V.M. mode. Press the green START BUTTON and to scroll through D.V.M., Internal Standard # 1, Internal Standard #2, and Internal Standard # 3 values.

1,2,3,4,13 up & 11 down

Will allow an operator to perform a subject test by pressing the START BUTTON. However, no information will be keyed in and a printout will not be obtained. Great for public service, or public awareness.

1,2,3,7,11 & 13 up

In the event of printer failure this switch setting may be used until a loaner instrument is obtained. No print card will be issued so it is essential that operators record all information in the instrument log.

### Useful switch settings

1,2,3 down

### Action

Activates a printer test when the green START BUTTON is pushed.

1,2,3(4) & 11 up

**This is the recommended setting used at this time for evidentiary testing. Use switch 4 to display 3 digits**

1 up

Display test. All characters will scroll across the display.

1,2,3,4,5 & 9 up

Will perform a performance verification check by pressing the green "START BUTTON". Use this if your keyboard goes out to perform a performance verification check.

1,2,3,4,5 & 13 up

No printout will be obtained and no Information will be entered. This setting is useful for demonstrations.

If a switch is not mentioned then it is assumed to be in the off position. For other mode settings see the operating manual for the Intoxilyzer 5000 that is published by CMI or call the local Forensic Lab.

### INSTRUMENT MESSAGES

Here are other instrument messages in addition to those found in the operator training manual that you should know about.

#### MESSAGE

"DVM \*23"

#### SOLUTION

This means your IR source is bad or failing. Changing the IR source, if you have the knowledge to do this, will solve the problem.

"INVALID MODE"

The switches on the right side of the instrument are set improperly. Setting them correctly will solve the problem.

"INVALID LOT NO"

Re-enter the lot number, taking care to enter ten alphanumeric characters. (e.g. Lot # 9801 must be entered as 0000009801).

## SIMULATORS

### CARE

1. Do not plug the simulator in without liquid. The heater bar will burn out rapidly in air.
2. After using the simulator allow it to air dry at least 24 hours before screwing the top onto the jar. This will help to prevent the formation of rust.

### USE

1. To use your wet bath simulator:
  - a) Pour solution into the simulator and plug it in.
  - b) Allow solution to warm to operating temperature (approximately 15 minutes).
  - c) Observe the temperature
  - d) If the simulator still is not within the suggested range, see trouble shooting in the analytical method/standard operating procedure.

## HANDLING OF PERFORMANCE VERIFICATION CHECK SOLUTIONS

1. Leave the solution in the simulator. Pouring the solution back and forth depletes the ethanol concentration. If storage of solution is required, let the simulator completely cool before removing the solution.
2. Store the performance verification check solutions tightly capped in a cool place out of direct sun light.
3. Add enough solution to the simulator jar to cover the propeller while still maintaining a level below the baffle.
4. Ordering of solutions should be done by the Breath Testing Specialist. If you need assistance call your local lab.
5. When changing out simulator solutions it is a good idea to perform a performance verification check with the new solution. This ensures that everything is setup and functioning properly for your operators.

## INTOXILYZER 5000 GENERAL MAINTENANCE AND REPAIRS

1. When doing maintenance and repairs on your instrument it is a good idea to do a performance verification check before and after to help prevent arguments that may arise.
2. Keep records of all maintenance and repairs performed.
3. Turn off or unplug the instrument depending on the type of maintenance or repair you are performing.

### MAINTENANCE

1. Nothing is to be stored on top of the Intoxilyzer.
2. Do not set cups of liquid on the instrument. A simple spill could leak onto the computer boards and cause shorts.
3. Try to keep the outer case clean. Use a glass cleaner such as 409 or other non-abrasive cleaner. Spray onto a cloth and wipe the case with the cloth. Do not spray directly onto the case (see #2).
4. Keep the area under and around the case free from dust and dirt.
5. Keep the area around the instrument free from volatile compounds. The presence of such chemicals could cause **AMBIENT FAILED** on the display.
6. Avoid sudden temperature fluctuations (a heat/air conditioning duct), or instrument may display **AMBIENT FAILED**.
7. The instrument has a built-in spike protector, but purchase of a surge protector may be useful in those areas which are often hit by these electrical surges.
8. **FILTER WHEEL DUST PROTECTOR:** Lay protective tape over the opening above the filter wheel.
9. Protect the plastic insert (coupler) in the end of the breath tube from loss and breakage.
10. Clean air intake screens at the base of the breath tube connection as needed.
11. Lube printer bar with silicone spray regularly. Do this by spraying the lubricant on a Q-tip or cloth then apply it on the bar. Never spray lubricants directly into the Instrument.
12. Use canned air obtained from your local hardware or electronics shop to blow out dust and debris that collect inside your instrument. Cleaning the chopper motor can cut down on unstable reference errors if your instrument is located in a dusty location.

**IMPORTANT:** Turn off the instrument and let the IR source cool down before blowing out the instrument.

Try to clean the inside of the instrument several times a year, especially the fan and screen on the bottom of the instrument.

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The instrument is very sensitive to the canned air chemicals and it may be necessary to ventilate the area well before starting any testing or an **AMBIENT FAILED** error message may be displayed.

13. When removing the black cover from the right side of the instrument make sure the 40 volt capacitors still have the paper covers on their ends. If they do not, glue them back down with a GLUE STICK, or cover them with electrical tape.

**CAUTION:** Potential electrical hazard. Unplug the instrument first.

### **REPAIRS**

- These instruments have a two (2) year warranty and repairs will generally be done at CMI. There are other approved vendors.
- Additional training for repairs can be obtained by attending the Intoxilyzer 5000 Users Group or a one-week training course at the factory.

Here are some of the places that do repairs on the Intoxilyzer 5000. This is not an inclusive list.

CMI, Inc.  
316 E. 9th Street  
Owensboro, KY 42303  
Phone: 1-866-835-0690

Applied Electronics  
52 Juniper Lane  
Eagle, CO 81631  
Phone: 1-970-328-5420

### **COBRA**

The Idaho State Police Forensic Services terminated the COBRA program in July 2010. The COBRA technology was antiquated and not functional with VoIP phone systems. ISPFS requests that "last drink" information still be provided to the Idaho State Police Alcohol Beverage Control Bureau.



## OPERATOR CLASS

1. There is no specific requirement for the length of the class as long as everything is covered, and students can pass a practical and written exam.
2. Must cover complete lesson plan for new operator class or operators whose certification has expired.
3. Do not let the operator take the test until the entire class has been taught.
4. Class materials can be copied from masters found in section three. Each student needs one copy of the SOP, and the Reference Manual.
5. Obtain certification card templates from the lab that has jurisdiction over your area.
6. **Send roster to POST.**
7. Keep a copy of the POST roster for your record. These should be maintained at least 3 years and are subject to audit by the Idaho State Police Forensic Services.
8. Grade the tests. **Do not let your students grade the test as you may need to testify to the certification of your students.**
9. Each student must successfully complete the written exam with 80% or better.
10. Issue the card to any student who successfully completes the class. Sign your name on the line that says "BTS signature". Expiration date is the last day of the 26th month from the day the class was taken.
11. Important things to teach in class:
12. It is a good idea to ask if subject has anything in mouth prior to the start of 15-minute waiting period.
13. The purpose and importance of the 15-minute waiting period.
14. Have officer maintain complete control over breath tube at all times.
15. Use new mouthpiece for each subject.
16. Log the results immediately after completing the test.
17. Always check for proper insertion of printcard before starting test.
18. Always check the date and time for correctness before starting test.
19. If anything unusual occurs prior to or during the test, the officer should make note of it on the alcohol influence report form or other place. For example: uncooperative subject.
20. Obtaining a sample if the Intoxilyzer 5000 won't let you perform a breath test.  
Special problems:
  - a) **DEFICIENT SAMPLE**-does not meet breath sample requirements.
  - b) **INVALID SAMPLE**- mouth alcohol.
  - c) **IMPROPER SAMPLE**- blew at wrong time.

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d) **INTERFERENT**- intoxicating substance other than alcohol. Get a blood sample.

21. Printcards:

a) Recommend officers sign cards.

b) Should fill in Time First Observed with starting time of 15-minute observation period.

22. Check the temperature of the simulator. If it is in range place a check in the appropriate column of the instrument log.

23. Position yourself so you are in front of the instrument and in control of breath tube. This will position the subject at the front left of the instrument which will help protect the simulator at the right rear.

NOTE: Some agencies leave the suspect in handcuffs while performing the breath test.

### ORDERING INFORMATION

Below are a number of places where you can get parts and accessories for the Intoxilyzer 5000 series.

**This list is not inclusive.**

-Guth	1-800-233-2338
-BesTest, Inc.	1-800-248-3244
-CMI	1-866-835-0690
-Applied Electronics	1-970-328-5420
-REPCO	1-919-876-5480
-National Draeger, Inc.	1-800-385-8666

## INTERNAL PARTS AND THEORY

This information is very general. Its purpose is to enhance your understanding of the performance and function of the instrument.

Depending on their physical size and structure, molecules absorb energy of specific frequencies. For example, alcohol molecules absorb certain frequencies of infrared energy. Accordingly, the Intoxilyzer 5000 breath analysis instrument uses an infrared energy absorption technique to find the alcohol concentration of a breath sample.

The heart of the Intoxilyzer 5000 instrument is its sample chamber. At one end of the chamber, a quartz iodide lamp emits infrared energy, which is directed through the chamber by a lens. At the opposite end of the chamber, a second lens focuses the energy leaving the chamber through three rotating filters and onto an infrared energy detector. These filters only allow certain wavelengths through.

Initially, the instrument establishes a zero reference point by measuring the amount of infrared energy striking the detector when the sample chamber is filled with room air. During a breath test, as the amount of alcohol vapor in the chamber rises, the amount of infrared energy reaching the detector falls. Therefore, by finding the difference between the zero reference point and the breath test measurement, the instrument can determine breath alcohol concentration. The unit displays the result in grams of alcohol per 210 liters. To assure accurate test results, the Intoxilyzer 5000 breath analysis instrument also checks to see that other substances that may interfere with the breath tests accuracy are not present.

### **A. Filter Wheel (Intoxilyzer 5000 Model)**

Three filters are embedded in the filter wheel. The Intoxilyzer 5000 uses these to measure alcohol concentration and detect interfering substances.

1. 3.48 Measures the concentration of alcohol and is set at 6.00 volts.
  - 3.80 Is used as a reference and is set at approximately at 6.00 volts.
  - 3.39 Looks for interferents and is set individually for each instrument around 4.00 volts.
    - a. In normal alcohol-only situation, a ratio exists between 3.39 and 3.48 peaks.
    - b. With the presence of acetone, 3.39 peak gets higher and ratio changes.
    - c. The Intoxilyzer 5000 series may electronically correct the ratio and subtract the interfering substance.
    - d. Not all substances are subtracted accurately. For this reason it is important to obtain a blood sample when an interferent is detected.
    - e. Intoxilyzer 5000 is not specific for ethyl alcohol.
2. Timing notch on the wheel keeps the computer in sync to filters.
3. Rotates at 1800 rpm. At this rate a sample is analyzed approximately 30 times per second.

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## B. Internal standards

Checks the functioning of the instrument by monitoring the voltages produced by the three filter wheel.

1. 3.39 is 0.100 standard.
2. 3.48 is 0.200 standard.
3. 3.80 is 0.300 standard.
4. With the filter wheel moving at 1800 rpm each internal standard is checked approximately 30 times a second.
5. Internal standards are directly linked to the established voltages and calibration setting of the instrument.
6. Any shift or change in voltages or calibration setting will be reflected in the Internal Standards.
7. If one or more of the internal standards are outside a 5% allowable tolerance the Intoxilyzer will abort the test with INTERNAL FAILED.
  - a. .100 std range is .095 to .105.
  - b. .200 std range is .190 to .210.
  - c. .300 std range is .285 to .315.

## C. Interferent detector

Detects interfering substances that may be present in a sample.

1. It is capable of doing this because of the analysis of multiple wavelengths
2. Performed by the instrument.
3. Comparison of 3.48 and 3.39 channels will cause automatic subtraction for performing a correction of the result

*Note: In order to have the acetone subtraction option active, the instrument needed to have been setup for acetone subtraction during the calibration sequence.*
4. With lower levels of acetone, subtraction is automatically done without any signal.
5. With higher levels of acetone and other interfering substances, Intoxilyzer will signal INTERFERENT on display.
6. Print card will also say "INTERFERENT DETECTED HAVE BLOOD DRAWN".

#### D. Mouth alcohol detector

This is accomplished by the analysis of a slope detector.

1. To be an acceptable alcohol reading, must have a positive slope.
2. Mouth alcohol has a negative slope.
3. Intoxilyzer 5000 performs a continuous comparison of the breath sample. The BrAC values must continue to climb, producing a positive slope. If the BrAC values of a sample are decreasing, producing a negative slope, the test is aborted with the printout "INVALID SAMPLE" (i.e. mouth alcohol contamination). Also present on the printout is the statement "REPEAT OBSERVATION PERIOD BEFORE RETESTING SUBJECT".
4. Operator should find the cause of problem, if possible, and start 15-minute waiting period over again.

#### E. Sample chamber

The sample chamber is where the initial analysis of the sample takes place.

1. It is the long tube located at the rear of the instrument.
2. Chamber size is 81 cubic centimeters in volume.
3. Fresnel lens on each end of chamber.
4. Light source located to the right.
5. Chopper motor and filter wheel located to the left.

#### F. Light Source

The light source is a tungsten filament halogen light bulb with one side coated with silver.

1. Emits all wavelengths of light.
2. Is "ON" all the time unless Intoxilyzer 5000 is turned "OFF".
3. Life span of 2000-3000 hours per bulb.
4. Light is directed through chamber by lens.

#### G. Detector

Detects the intensity of light.

1. Detects the bands of infrared light that pass through the filters.

#### H. Breath sampling mechanism

1. Flow through technology.
2. Pressure switch in breath line (approximately 2" water).
  - a. As breath is forced into the instrument, the switch is forced open.
  - b. Must be held open continuously for 5 seconds.
  - c. Tone starts as soon as pressure is reached.
3. Intoxilyzer 5000 starts analysis immediately, but doesn't give a result until a valid sample is obtained or the 3-minute time allowance has passed.
4. The Intoxilyzer 5000 also has a slope detector:
  - a. Monitors change in alcohol concentration with time.
  - b. Increase in alcohol must not be greater than .003/second for sample to be accepted as valid.
  - c. Intoxilyzer 5000 does 30 analyses on the breath sample each second.
5. The tone indicates that the subject is blowing and the pressure switch is open.
6. All breath lines and sample chamber are kept small so that any breath found in the chamber after 4-5 seconds is breath that was recently blown in.
7. Earlier breath has been forced out of the chamber.
8. Average lung capacity is about 4 liters. When a person finally runs out of breath, about 2.5 to 3 liters of breath has been expelled.
9. If the subject stops blowing before the pressure and slope requirements have been met, the Intoxilyzer will beep every 5 seconds for 3 minutes at which time it will end the test and print "DEFICIENT SAMPLE" on the printcard.
10. Breath must be one long, continuous sample or it will not be accepted.
11. Breath line is heated to 105 to 110 °F to prevent water condensation.
12. The agreement of two separate breath samples strongly refutes the possibility of an instrument malfunction, radio frequency interference, mouth alcohol, or other possible sources of error (see Idaho Breath Alcohol Standard Operation Procedure).

## **I. Processor Components**

1. RAM chip is a random access memory chip, which stores the memory of tests, performance verification checks and instrument internal checks.
  - a. Needs constant source of power to maintain its memory.
  - b. Ram board has a rechargeable battery which will hold the memory for 6-7 weeks.
2. EPROM chips are Erasable Programmable Read Only Memory chips that are programmed at the factory and contain the permanent memory of the instrument such as serial number and the question series program.
  - a. There are three EPROMs that work as a set.
  - b. EPROMs do not need a constant current to maintain memory.

## **J. Internal Printer**

1. Impact printer, no ribbon.
2. Needs NCR paper for the print cards.

## **K. Three-way valves**

There are two of these valves which channel samples.

1. One directs the flow from either the breath tube or the simulator port through to the sample chamber.
2. The other allows for simulator recirculation.

## **L. Radio frequency detector**

1. Antenna wire is wrapped around breath tube.
2. Detector is internal, located on the CPU board.
3. Entire Intoxilyzer 5000 is a FARADAY CAGE, completely grounded and all openings screened.
4. Although RFI cannot affect the readings, any RFI emissions picked up by the external antenna will cause the instrument to report RFI DETECTED and stop the test.
5. Demonstrate RFI with a hand-held radio.

## INTERNAL PARTS AND THEORY UNIQUE TO THE 5000EN

This is information that is unique to the Intoxilyzer 5000EN in relation to the previous Intoxilyzer 5000.

### **A. Filter Wheel (Intoxilyzer 5000EN Model)**

The Intoxilyzer 5000EN has five filters embedded in the filter wheel. It uses these filters to measure alcohol concentration and to detect interfering substances.

1. 3.47 Measures the concentration of alcohol.
- 3.80 Is used as a reference.
- 3.40, 3.36, and 3.52 Look for interfering substances. Make the instrument more specific to ethanol.
  - a. In a normal alcohol-only situation, a ratio exists between the 3.40 and 3.47 peaks.
  - b. With the presence of acetone, 3.40 peak gets higher and ratio changes.
  - c. Intoxilyzer 5000 series electronically corrects the ratio and subtracts the interfering substance.
  - d. **Not all substances are subtracted accurately. For this reason it is important to obtain a blood sample when an interferent is detected.**
  - e. Unlike the previous Intoxilyzer 5000, the Intoxilyzer 5000EN is able to detect other types of alcohol as interferents. For example this instrument will respond "INTERFERENT DETECTED" in the presence of methanol and isopropanol.
2. Timing notch on the filter wheel keeps the computer in sync to filters.

### **B. Internal standards**

Checks the functioning of the instrument by monitoring the voltages produced by the five filters on the filterwheel.

1. 3.40 is .100 standard.
2. 3.47 is .200 standard.
3. 3.80 is .300 standard.
4. 3.36 is .400 standard.
5. 3.52 is .500 standard.
6. Internal standards are directly linked to the established voltages and calibration setting of the instrument.
7. Any shift or change in voltages or calibration setting will be reflected in the Internal Standards.

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8. If one or more of the internal standards are outside a 5% allowable tolerance the Intoxilyzer will abort the test with INTERNAL FAILED.

- a. .100 STD range is .095 to .105.
- b. .200 STD range is .190 to .210.
- c. .300 STD range is .285 to .315.
- d. .400 STD range is .380 to .420.
- e. .500 STD range is .475 to .525.

#### **C. Printer**

1. The internal printer is an impact printer, no ribbon.
2. Needs NCR paper for the print cards.
3. The Intoxilyzer 5000EN is equipped with a connection for an external printer. The internal printer is automatically disabled when an external printer is connected to the instrument.

#### **D. Flow Sensor**

The pressure switch in the previous Intoxilyzer has been replaced by a flow sensor.

1. There are four minimum requirements that must be met before a sample will be taken.
  - a. 1.1 Liters of air must be expired.
  - b. The subject must blow for a minimum of one second.
  - c. The alcohol concentration slope must level off.
  - d. The pressure must reach approximately 1" of water.

### **E. Standby Mode**

The Standby Mode allows the Intoxilyzer 5000EN to be used with a short warm up time and results in less wear on the instrument than being left running continuously.

1. In the Standby Mode, power is applied only to the heaters in the instrument.
2. When a cold Intoxilyzer is turned on, the instrument will take 30 minutes to warm up to the proper operating temperature before it begins diagnostics and moves into the IDLE MODE. When the instrument is reactivated from the Standby Mode, it only will need two minutes to warm up.
3. To reactivate the instrument from the Standby Mode you only need to press the START TEST button.
4. The Standby Mode can be easily noted because the display will be blank and the red power light will still be lit.
5. The amount of time allowed before the instrument "times out" is controlled through the "ESC ESC E" menu option. Entering zero (0) will force the instrument to always on.
6. The simulator does not shut off in the Standby Mode and will be on any time there is power to the instrument.

### **F. Temperature Monitoring**

The Intoxilyzer 5000EN has a temperature monitoring feature that allows the instrument to verify the simulator temperature is  $34^{\circ}\text{C} \pm 0.5$ .

1. During the test sequence, prior to the performance verification check, the instrument will check the simulator temperature. If it is in range, on the final report will be printed "SIMULATOR TEMPERATURE IN RANGE". If it is out of range, the test sequence will be aborted.
2. This temperature monitoring feature is controlled through the "ESC ESC W" menu.
3. When this feature is turned off, before the performance verification check is performed, the operator will be prompted to answer the question "SIM IN RANGE Y/N".



## 6.0 Idaho Standard Operating Procedure

### Breath Alcohol Testing

Idaho State Police  
Forensic Services

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## Glossary

**Approved Vendor:** A source/provider/manufacturer of an approved premixed alcohol simulator standard shall be explicitly approved as a vendor of premixed alcohol simulator solutions or dry gas alcohol cylinders for distribution within Idaho.

**Breath Alcohol Test:** A series of separate breath samples provided during a breath testing sequence.

**Breath Alcohol Testing Sequence:** A sequence of events as determined by the Idaho State Police Forensic Services, which may be directed by either the instrument or the Operator, but not both, and may consist of air blanks, performance verification, internal standard checks, and breath samples.

**Breath Testing Specialist (BTS):** An individual who has completed an advanced training class approved by the Idaho State Police Forensic Services. BTS certification is valid for 26 calendar months and expires on the last day of the 26th month.

**Certificate of Analysis:** A certificate stating that the premixed ethyl alcohol standards used for performance verification have been tested and approved for use by the ISPFS.

**Certificate of Approval:** A certificate stating that an individual breath alcohol testing instrument has been evaluated by the ISPFS and found to be suitable for forensic alcohol testing. The certificate bears the signature of an Idaho State Police Forensic Services Lab Manager, and the effective date of the instrument approval.

**Changeover Class:** A training class for currently certified personnel during which they are taught theory, operation, and proper testing procedure for a new make or model of instrument being adopted by their agency. Breath Testing Specialists attend BTS training that qualifies them to perform BTS duties related to the instrument.

**Evidentiary Test:** A breath test performed on a subject/individual for potential evidentiary or legal purposes. A distinction is made between evidentiary testing and community service or training tests performed with the instrument.

**Idaho State Police Forensic Services (ISPFS):** Formerly known as the Bureau of Forensic Services, the ISPFS is dedicated to providing forensic science services to the criminal justice system of Idaho. ISPFS is the administrative body for the breath alcohol testing program per IDAPA 11.03.01.

**MIP/MIC:** An abbreviation used to designate minor in possession or minor in consumption of alcohol.

**Operator Certification:** The condition of having satisfied the training requirements for administering breath alcohol tests as established by the ISPFS. Operator certification is valid for 26 calendar months and expires on the last day of the 26th month.

**Operator:** An individual certified by the ISPFS as qualified by training to administer breath alcohol tests.

**BTS/Operator Class:** An ISPFS approved training class for prospective or uncertified breath alcohol Operators/Breath Testing Specialists.

**Performance Verification:** A verification of the accuracy of the breath testing instrument utilizing a performance verification standard. Performance verification should be reported to three decimal places. While ISPFS uses the term performance verification, manufacturers and others may use a term such as "calibration check" or "simulator check."

**Performance Verification standard:** A ethyl alcohol standard used for field performance verifications. The standard is provided by and/or approved by ISPFS.

**Recertification Class:** A training class for currently certified personnel, completion of which results in uninterrupted continuation of their Operator or BTS status for an additional 26 months.

**Waiting Period/Monitoring Period/Deprivation Period/Observation Period:** 15-minute period prior to administering a breath alcohol test, in which an officer monitors the test subject/individual.

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## Breath Alcohol Standard Operating Procedure

### List of Revisions

<u>SOP Section</u>	<u>Topic</u>	<u>Date of Revision</u>
2	Delete reference to ALS	June 1, 1995
2	0.02/0.20 solutions	June 1, 1995
3.2.1	Valid breath tests	October 23, 1995
2.1	Alco-Sensor calibration checks	May 1, 1996
2.2	Intoxilyzer 5000 Calibration Checks Effective June, 1996	May 1, 1996
2.1.2	0.003 agreement	June 1, 1996
2.1.2	Operators may run calibration checks	July 1, 1996
2.1.2	Re-run a solution within 24 hours	September 6, 1996
2.1	All 3 solutions run within a 24-hour period	September 6, 1996
2	All 3 solutions run within a 24-hour period	September 6, 1996
2.1.2	Re-running of a solution	September 26, 1996
2.1	All solutions run within a 48-hour period Reference to "three" removed	September 26, 1996 Oct. 8, 1996
2	All 3 solutions run within a 48-hour period	September 26, 1996
2	More than three calibration solutions	October 8, 1996
2	Solution values no longer called in to BFS	April 1, 1997
2.1	Alco-Sensor and Intoxilyzer 5000 calibration check	August 1, 1998
2.2	Calibration checks for the Intoxilyzer 5000	February 11, 1999
	Name change, all references made to the Bureau of Forensic Services were changed to Idaho State Police Forensic Services.	August 1999
1.6	Record Management	August 1, 1999
2	Deleted sections on relocating, repairing, recalibrating, and loaning of instruments from previous revision.	August 1, 1999

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1.2, 2.1, 2.2 3	Alco-Sensor and Intoxilyzer 5000 calibration checks Deleted sections on blood and urine samples for alcohol determination	August 1, 1999 August 1, 1999
1.6	Operator certification record management	January 29, 2001
1.2, and 3 2.1. 2.2	Reformat numbering Requirement for running 0.20 simulator solution	August 18, 2006
2.2.1.1.2.2	Changed 3-sample to "two print cards".	November 27, 2006
2.2.1.1.2.2 2.1.2.1 and 2.2.4	Deleted "simulator port" and "two print cards". Simulator temperature changed from "should" to "must".	May 14, 2007 May 14, 2007
2.2.1.1.2.2	Clarification of 0.20 calibration checks.	September 18, 2007
1.2	Added the Lifeloc FC20	February 13, 2008
1.5	Deleted requirement that the new instrument utilize the same technology if the BTS is currently certified	February 13, 2008
2	Modified the accepted range for simulator solutions to +/- 10%, eliminating the +/- 0.01 provision. Added "Established target values may be different from those shown on the bottle label"	February 13, 2008
2.2	Added Lifeloc FC20 calibration checks Intoxilyzer 5000 calibration is now section 2.3	February 13, 2008
2.	Modified to specifically allow use of the 0.20 during subject testing	February 13, 2008
Sections 1, 2, 3	General reformat for clarification. Combined Alcosensor and Lifeloc sections. Specifically, changed calibration requirement using the 0.20 reference solution from four (4) checks to two (2).	December 1, 2008
2.1.4, 2.2.3, 2.2.4, 2.2.5 And 2.2.10	Clarification: a "calibration check" consists of a pair of samples in sequence and both samples must be within the acceptable range before proceeding with subject testing. A 0.20 solution should be replaced every 20-25 samples. Clarified the correct procedure for performing a calibration check.	January 14, 2009
2.1.3, 2.1.4.1, 2.1.9	Clarification: Added " <i>before and after</i> " to the 0.08 and 0.20 calibration checks, within 24 hours of a subject test. The official time and date of the calibration check is the time and date recorded on the printout, <i>or the time and date recorded in the log, whichever corresponds to the calibration check referenced in section 2.1.3 or 2.1.4.1.</i>	July 7, 2009

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## History Page

Revision #	Effective date	History
0	8/20/2010	The entire SOP was rewritten to incorporate language changes regarding performance verifications, and to clear-up ambiguities associated with the 0.20 verification and the relevance to cases not involving an 18-8004C charge. Scope and safety sections were added. Troubleshooting, MIP/MIC sections added.
1	8/27/2010	Deletions and/or additions to sections 2, 4.3.3, 4.4.1, 4.4.3, 4.4.5, 4.6.1.1, 5.1.2, 5.1.4, 5.1.4.1, 5.1.5, 5.2.4, 5.2.5, 6, 6.2.1, 6.2.3, 6.2.4, 7, 7.1, 7.1.1, 7.1.2, 7.1.2.2, 7.1.3, 7.1.4, 7.1.5, 8.
2	11/01/2010	Section 6.2 clarified for instrument specificity, added sections 6.2.2.3, 6.2.2.3.1 and 6.2.2.4, added section 8.0 for the MIP/MIC procedure, clarified section 5.1.3 for the use of 0.20 solutions, renamed document to 6.0
3	4/23/2012	Section 5.0 modified to better reflect current practices and be in agreement with AM 1.0 for certification of premixed solutions; Updated 5.2.5 to clarify performance verifications.
4	1/16/2013	Changes were made to sections: Glossary, Scope, Safety, 4.3, 4.3.3, 4.4, 4.4.1, 4.4.4, 5, 5.1.2, 5.1.4, 5.1.4.1, 5.1.5, 5.2.4, 5.2.5, 5.2.10, 6.1.2, 6.1.4, 6.1.4.1, 6.1.4.2, 6.2.1, 6.2.2.3, 6.2.2.3.1, 6.2.2.4, 7.1.1. Sections 4.4.3.1, 5.1.4.2, 5.2.4.1, 6.2.4.1 and 5.1.2.1 were added.

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# **1 Quantitative Analysis for Alcohol in Breath by Approved Breath Testing Instruments.**

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## **2 Scope**

This method describes the Idaho State Police Forensic Services (ISPFS) procedure, for use by agencies external to ISPFS, for the analysis of breath for the presence of volatile compounds using an approved breath testing instrument. This method provides for the quantitative analysis of ethanol.

Following all the recommendations of this external procedure will establish the scientific validity of the breath alcohol test. Failure to meet all of the recommendations within this procedure does not disqualify the breath alcohol test, but does allow for the questioning of the breath alcohol tests as it pertains to its foundation of admissibility in court. That foundation can be set, through testimony, by a Breath Testing Specialist expert or ISPFS expert in breath testing as to the potential ramifications of the deviation from the procedure as written.

## **3 Safety**

Within the discipline of breath alcohol testing, the general biohazard safety precautions should be followed. This is due to the potential infectious materials that may be ejected from the mouth during the sampling of the breath. Caution should be taken so as the expired breath is not directed towards the officer or other unrelated bystander. Other hazards that may be present include, but are not limited to, the use of compressed gas cylinders, flammable alcohol solutions, or other volatile materials.

## **4 Instrument and Operator Certification**

To ensure that minimum standards are met, individual breath testing instruments, Operators, and Breath Testing Specialists (BTS) must be approved and certified by the Idaho State Police Forensic Services (ISPFS). The ISPFS will establish and maintain a list of approved instruments by manufacturer brand or model designation for use in the state.

**4.1 Approval of Breath Testing Instruments.** In order to be approved and certified each instrument must meet the following criteria:

**4.1.1** The instrument shall analyze a reference sample or analytical test standard, the results of which must agree within +/- 10% of the target value or such limits set by ISPFS.

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- 4.1.2 The certification procedures shall be adequate and appropriate for the analysis of breath specimens for the determination of alcohol concentration for law enforcement.
- 4.1.3 Any other tests deemed necessary to correctly and adequately evaluate the instrument to give accurate results in routine breath alcohol testing.
- 4.2 The ISPFS may, for cause, remove a specific instrument by serial number from evidential testing and suspend or withdraw certification thereof.
- 4.3 Operators become certified by completing a training class approved by ISPFS. Certification is for 26 calendar months and expires the last day of the 26th month. Certification will allow the Operator to perform all functions required to obtain a valid breath alcohol test. It is the responsibility of the individual Operator to maintain their current certification; the ISPFS may not notify Operators that their certification is about to expire.
- 4.3.1 Recertification for another 26-month period is achieved by completing an ISPFS approved Operator class prior to the end of the 26th month.
- 4.3.2 If the individual fails to satisfactorily complete the class (including the written and practical tests), or allows their certification status to expire, he/she must retake the Operator class in order to become certified.
- 4.3.3 If current Operator certification is expired, the individual is not approved to run evidentiary breath alcohol tests on the instrument in question until the Operator class is completed.
- 4.3.3.1 There are no grace periods or provisions for extension of Operator certification.
- 4.4 Breath Testing Specialists (BTS) are Operators who have completed an advanced training class and are ISPFS-certified to perform routine instrument maintenance, and provide both initial and recertification training for instrument Operators.
- 4.4.1 BTS certification is then obtained by completing an approved BTS training class.
- NOTE: The prior Operator status "on that particular instrument" requirement is waived for new instrumentation.
- 4.4.2 BTS Certification is valid for 26 calendar months.
- 4.4.3 If BTS certification is allowed to expire, the individual reverts to certified Operator status for 12 calendar months for that instrument. He/she may no longer perform any BTS specific duties relating to that particular instrument.

4.4.3.1 BTS specific duties entail the teaching of operator classes, proctoring of proficiency tests for operators, and testifying as experts on alcohol physiology and instrument function in court.

4.4.4 BTS certification is renewable by completing an approved BTS training class.

4.4.5 The Idaho State Police Forensic Services may revoke BTS certification for cause. Examples of what may constitute grounds for revocation may include falsification of records, failure to perform required performance verification, failure to successfully pass a BTS recertification class and failure to meet standards in conducting Operator training.

4.5 Adoption of a new instrument by an agency will require updating any BTS and Operators in that agency in the use of the new instrument.

4.5.1 A currently certified BTS may become a certified BTS for a new instrument by completing an ISPFs approved BTS Instrumentation class.

4.5.2 A currently certified Operator may certify on a new instrument by completing an ISPFs approved Operator Instrumentation Class for the new instrument.

4.5.3 Individuals not currently certified as Operators must complete an Operator Class for each approved instrument.

4.6 Record maintenance and management. It is the responsibility of each individual agency to store performance verification records, subject records, maintenance records, instrument logs, or any other records as pertaining to the evidentiary use of breath testing instruments and to maintain a current record of Operator certification.

4.6.1 It is the responsibility of the agency to see that the said records are stored and maintained a minimum of (3) years in accordance with IDAPA 11.03.01.

4.6.1.1 Records may be subject to periodic audit by the Idaho State Police Forensic Services.

4.6.2 The Idaho State Police Forensic Services will not be responsible for the storage of such records not generated by ISPFs.

## 5. Performance Verification of Breath Testing Instruments

Performance verifications aid the Breath Testing Specialist (BTS) and the Idaho State Police Forensic Services (ISPFS) in determining if a breath testing instrument is functioning correctly. Performance verifications are performed using a wet bath simulator performance verification standard. The standard is provided by and/or approved by ISPFS. The certificate of analysis confirms the target value and acceptable range of the standards used for the verification and includes the acceptable values for each standard. Note: The ISPFS confirmed target values should be taken directly from the Certificate of Analysis for each standard lot and not from the bottles/cylinders.

### 5.1 Alco-Sensor and Lifeloc FC20-Portable Breath Testing Instrument Performance Verification

5.1.1 The Alco-Sensor and Lifeloc FC20, portable breath testing instrument performance verification is run using approximately 0.08 and/or 0.20 performance verification standards provided by and/or approved by ISPFS.

5.1.2 The performance verification using the 0.08 and 0.20 performance verification standards consist of two samples.

5.1.2.1 For the Lifeloc FC20, the performance verifications can be obtained using either the "wet check" screen located in the calibration menu, or they can be performed as a regular test using the test sequence or non-sequence data acquisition modes.

5.1.3 A performance verification of the Alco-Sensor and Lifeloc FC20 instruments using a 0.08 or 0.20 performance verification standard must be performed within 24 hours, before or after, an evidentiary test to be approved for evidentiary use. Multiple breath alcohol tests may be covered by a single performance verification. Reference 5.1.4.1 for clarification on the use of the 0.20 standard in this capacity.

5.1.3.1 A 0.08 performance verification standard should be replaced with fresh standard approximately every 25 verifications or every calendar month, whichever comes first.

5.1.4 A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh standard approximately every 25 verifications or until it reaches its expiration date, whichever comes first

**NOTE:** The 0.20 performance verification was implemented for the sole purpose of supporting the instruments' results for an 18-8004C charge. Failure to perform a monthly 0.20 performance

verification will not invalidate tests performed that yield results at other levels or in charges other than 18-8004C.

5.1.4.1 The 0.20 performance verification satisfies the requirement for performance verification within 24 hours, before or after, an evidentiary test at any level.

5.1.4.2 When a suspect provides a breath sample over a 0.20, the officer is not required to conduct a performance verification using a 0.20 solution, as long as a performance verification was conducted within 24 hours of the breath sample pursuant to 5.1.3 and a 0.20 performance verification has been performed pursuant to section 5.1.4.

5.1.5 Acceptable results for a 0.08 or 0.20 performance verification is a pair of samples in sequence that are both within  $\pm 10\%$  of the performance verification standard target value. Target values and ranges of acceptable results are included in a certificate of analysis for each standard lot series, available from, the ISPFS.

**NOTE:** Due to external factors associated with changing a performance verification standard the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results is obtained. However, if results after a total of three test series for any standard (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. The suggested troubleshooting procedure should be followed if the initial performance verification does not meet the acceptance criteria.

5.1.6 Temperature of the simulator must be between 33.5°C and 34.5°C in order for the performance verification results to be valid.

**NOTE:** The simulator may need to warm for approximately 15 minutes to ensure that the metal lid is also warm. If the lid is cold, condensation of alcohol vapor may occur producing low results.

5.1.7 Performance verification standards should only be used prior to the expiration date.

5.1.8 An agency may run additional performance verification standard levels at their discretion.

5.1.9 The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log, whichever corresponds to the performance verification referenced in section 5.1.3 or 5.1.4.1.

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## 5.2 Intoxilyzer 5000/EN Performance Verification

Intoxilyzer 5000/EN instruments must have a performance verification with each evidentiary test. If the performance verification is within the acceptable range for the lot of standard being used, then the instrument will be approved and the resulting breath samples will be deemed valid for evidentiary use.

5.2.1 Intoxilyzer 5000/EN performance verification is run using 0.08 and/or 0.20 performance verification standards provided by and/or approved by ISPFS.

5.2.2 During each evidentiary breath alcohol test using the Intoxilyzer 5000/EN, a performance verification will be performed as directed by the instrument testing sequence and recorded as SIM CHK on the printout. If the SIM CHK is not within the acceptable range for the standard lot being used, the testing sequence will abort and no breath samples will be obtained.

5.2.3 A two sample performance verification using a 0.08 performance verification standard should be run and results logged each time a standard is replaced with fresh standard (this is not a requirement but only a check that the instrument is connected correctly prior to an evidentiary test being performed). A 0.08 performance verification standard should be replaced with fresh standard approximately every 100 samples or every calendar month, whichever comes first.

5.2.4 A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh standard approximately every 25 verifications or until it reaches its expiration date, whichever comes first.

**NOTE:** The 0.20 performance verification was implemented for the sole purpose of supporting the instruments' results for an 18-8004C charge. Failure to perform a monthly 0.20 performance verification will not invalidate tests performed that yield results at other levels or in charges other than 18-8004C.

5.2.4.1 When a suspect provides a breath sample over a 0.20, the officer is not required to conduct a performance verification using a 0.20 solution, as long as a performance verification was conducted pursuant to 5.2.2.

5.2.5 Acceptable results for an independent 0.08 or 0.20 performance verification, which is not performed during a breath testing sequence, are a pair of back-to-back samples that are both within +/- 10% of the performance verification standard target value. Performance verifications that are performed during a breath testing sequence are acceptable with a single test result within +/- 10% of the standard target value. Target values and ranges of acceptable results for each standard lot series are included in a certificate of analysis available from, the ISPFS.

NOTE: Due to external factors associated with changing a performance verification standard the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results is obtained. However, if results after a total of three test series for any standard (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPPS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. Follow the suggested troubleshooting procedure if the initial performance verification does not meet the acceptance criteria.

- 5.2.6 The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log.
- 5.2.7 Performance verification standards should only be used prior to the expiration date.
- 5.2.8 Temperature of the simulator must be between 33.5°C and 34.5°C in order for the performance verification results to be valid.
- 5.2.9 An agency may run additional performance verification standard levels at their discretion.
- 5.2.10 The correct acceptable range limits and performance verification standard lot number should be set in the instrument before proceeding with evidentiary testing.

## 6. Evidentiary Testing Procedure

Proper testing procedure by certified Operators is necessary in order to provide accurate results. Instruments used in Idaho measure alcohol in the breath, not the blood, and report results as grams of alcohol in 210 liters of breath.

- 6.1 Prior to evidentiary breath alcohol testing, the subject/individual should be monitored for at least fifteen (15) minutes. Any foreign objects/materials which have the potential to enter the instrument/breath tube or may present a choking hazard should be removed prior to the start of the 15 minute waiting period. During the monitoring period the subject/individual should not be allowed to smoke, drink, eat, or belch/burp/vomit/regurgitate.

NOTE: If a foreign object/material is left in the mouth during the entirety of the 15 minute monitoring period, any potential external alcohol contamination will come into equilibrium with the subject/individual's body water and/or dissipate so as not to interfere with the results of the subsequent breath alcohol test.

- 6.1.1 The breath alcohol test must be administered by an Operator currently certified in the use of the instrument.
- 6.1.2 False teeth, partial plates, bridges or comparable dental work installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test (see above NOTE for clarification on foreign objects being left in the mouth).
- 6.1.3 The Operator may elect a blood test in place of the breath alcohol test if there is a failure to complete the fifteen minute monitoring period successfully.
- 6.1.4 During the monitoring period, the Operator should be alert for any event that might influence the accuracy of the breath alcohol test.
- 6.1.4.1 The Operator should be aware of the possible presence of mouth alcohol as indicated by the testing instrument. If mouth alcohol is suspected or indicated, the Operator should begin another 15-minute waiting period before repeating the testing sequence.
- 6.1.4.2 If, during the 15-minute waiting period, the subject/individual vomits or regurgitates material from the stomach into the subject/individual's breath pathway, the 15-minute waiting period should begin again.
- 6.1.4.3 If there is doubt as to the events occurring during the 15 minute monitoring period, the officer should look at results of the duplicate breath samples for evidence of potential alcohol contamination. For clarification see section 6.2.2.2.



- 6.2 A complete breath alcohol test includes two (2) valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath samples performed with a portable breath testing instrument should be approximately 2 minutes apart or more (for the ASIII's and the FC20's). Refer to section 6.2.2.2.

**NOTE:** A deficient or insufficient sample does not automatically invalidate a test sample.

- 6.2.1 If the subject/individual fails or refuses to provide a duplicate, adequate sample as requested by the Operator, the single test result shall be considered valid. Refer to 6.2.2.4 for further guidance.

6.2.1.1 The Operator may repeat the testing sequence as required by circumstances.

6.2.1.2 The Operator should use a new mouthpiece for each series of tests.

- 6.2.2 A third breath sample is required if the first two results differ by more than 0.02.

6.2.2.1 Unless mouth alcohol is indicated or suspected, it is **not** necessary to repeat the 15-minute waiting period to obtain a third breath sample.

6.2.2.2 The results for duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject/individual's breath pathway, show consistent sample delivery, and indicates the absence of RFI as a contributing factor to the breath results.

6.2.2.3 In the event that all three samples fall outside the 0.02 correlation, and the officer suspects that mouth alcohol could have been a contributing factor, then they should restart the 15 minute observation period and retest the subject, or have blood samples drawn.

6.2.2.3.1 If the officer does not suspect that mouth alcohol was present, and that the sample variability was due to a lack of subject cooperation in providing consistent samples as requested, then the samples can be considered valid if all three samples are above the per se limit of prosecution.

6.2.2.4 If the breath sample(s) provided cannot establish a 0.02 correlation the officer may at their discretion elect to have a blood sample drawn for analysis in lieu of retesting the subject's breath alcohol concentration.

6.2.3 The Operator should log test results and retain printouts, if any, for possible use in court.

6.2.4 If a subject/individual fails or refuses to provide a duplicate, adequate sample as requested by the Operator, the results obtained are still considered valid by the ISPFS, provided the failure to supply the requested samples was the fault of the subject/individual and not the Operator.

6.2.4.1 Failure to provide a complete breath test due to the lack of 0.020 correlation in the samples provided needs to be clearly articulated that the lack of sample correlation was the fault of the subject and not of the instrument or of the samples themselves. The officer's observations of the subject need to be clear enough to explain any discrepancies. Refer to 6.2.2.2 for some examples of 0.020 correlation deficiencies.

6.2.5 If the second or third samples are lacking due to instrument failure, the Operator should attempt to utilize another instrument or have blood drawn.

## 7. Troubleshooting Procedure

Proper testing procedure by certified Operators is necessary in order to provide accurate results.

- 7.1 Performance verification: If, when performing the periodic performance verification, the instrument falls outside the limits of the verification, the troubleshooting guide should be used.

NOTE: This is a guide for troubleshooting performance verifications outside the verification limits and the procedure is recommended to streamline and isolate the potential cause of the problem. Strict adherence to the guidelines is not required.

- 7.1.1 The three sources of uncertainty when performing the periodic performance verifications using a wet bath simulator are in the simulator setup and Operator technique, the simulator performance verification standard, and the instrument calibration itself.

- 7.1.2 If the first performance verification is outside the verification limits, the simulator setup and technique of the Operator performing the verification should be evaluated. The simulator should be evaluated to ensure that it is hooked up properly, uses short hoses, is properly warmed, is within temperature, the Operator blow technique is not too hard or soft, and that the Operator does not stop blowing until after the sample is taken.

- 7.1.2.1 The performance verification should be run a second time

- 7.1.2.2 If the performance verification is within the verification limits on the second try, the instrument passes the performance verification.

- 7.1.3 If the second performance verification is outside the verification limits, then the performance verification standard should be evaluated next.

- 7.1.3.1 The performance verification standard should be changed to a fresh standard.

- 7.1.3.2 The standard should be warmed for approximately 15 minutes, or until the temperature is within range, and the simulator lid is as warm as the simulator jar.

- 7.1.3.3 The performance verification may then be repeated.

- 7.1.4 If the third performance verification is outside the verification limits, the instrument must be taken out of service and sent to the ISPFS or an approved service provider.

- 7.1.5 Upon return from service, the instrument should be recertified by ISPFS before being put back into service.

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## 7.2 Thermometers:

7.2.1 If a bubble forms in the thermometer, the Operator or BTS can place the thermometer in a freezer to draw the mercury (or equivalent) into the bulb of the thermometer. This should disperse the bubble.

[illegible]

## 8. Minors in Possession/Minors in Consumption Procedure

Breath testing instruments certified by ISPFS are often used in investigating violations of Idaho Code § 23-949 (punishment set forth by I.C. § 18-1502) or Idaho Code § 23-604 (punishment set forth by I.C. 18-1502), wherein a person under twenty-one (21) years of age is deemed to have possessed and consumed alcohol. Unlike the Driving Under the Influence statutes and their associations with per se limits of 0.08 and 0.20, a specific level of alcohol is not required to prove a violation of I.C. § 23-949 or § 23-604. There is no requirement that the State prove the person is impaired by alcohol. Rather, the presence or absence of alcohol is a determining factor for proving the offense. Therefore, there is a different standard operating procedure associated with this type of charge. The main purpose of the procedure outlined below is to rule out "mouth alcohol" as a potential contributing factor to the results given during the breath testing done for MIP/MIC cases.

- 8.1 15 minute observation period: The monitoring/observation period is not required for the MIP/MIC procedure. The duplicate samples, separated by approximately 2 minutes or more and within the 0.02 correlation, provide the evidence of consistent sample delivery, the absence of "mouth alcohol" as well as the absence of RFI (radio frequency interference) as a contributing factor to the results of the breath test.
- 8.2 MIP/MIC requirements:
  - 8.2.1 The breath alcohol test must be administered by an operator currently certified in the use of that instrument.
  - 8.2.2 The instrument used must be certified by ISPFS.
    - 8.2.2.1 The instrument only needs to be initially certified by ISPFS. Initial certification shows that the instrument responds to alcohols and not to acetone.
    - 8.2.2.2 The instrument used does not need to meet other requirements set forth in previous sections of this SOP. It does not need to be checked regularly or periodically with any of the 0.08 or 0.20 standards.
  - 8.2.3 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.
  - 8.2.4 The officer should have the individual being tested remove all loose foreign material from their mouth before testing. The officer may allow the individual to briefly rinse their mouth out with water prior to the breath testing.

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8.2.5 Any material containing alcohol left in the mouth during the entirety of the breath testing sampling could contribute to the results in the breath testing sequence. (For clarification refer to section 8.1)

8.3 Procedure:

A complete breath alcohol test includes two (2) valid breath samples taken from the subject and preceded by an air blank. The duplicate breath samples do not need to be consecutive samples. The individual breath samples should be 2 minutes or more apart, to allow for the dissipation of potential mouth alcohol contamination.

**NOTE:** A deficient or insufficient sample does not automatically invalidate a test sample.

8.3.1 If the subject/individual fails or refuses to provide a duplicate adequate sample as requested by the operator, the single test result will be considered valid.

8.3.1.1 The operator may repeat the testing sequence as required by circumstances.

8.3.1.2 The operator should use a new mouthpiece for each individual and for each series of tests (i.e. complete set of breath testing samples).

8.3.2 A third breath sample is required if the first two results differ by more than 0.02.

8.3.2.1 The results for duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject's breath pathway (mouth alcohol), show consistent sample delivery, and indicates the absence of RFI as a contributing factor to the breath results.

8.3.2.2 In the event that all three samples fall outside the 0.02 correlation, and the officer suspects that mouth alcohol could have been a contributing factor, then they should administer a 15 minute observation period and then retest the subject. If mouth alcohol is not suspected, then the officer may reinstruct the individual in the proper breath sample technique and retest the subject without administering a 15 minute observation.

8.3.3 The operator should manually log test results and/or retain printouts for possible use in court.

8.3.4 The instrument should not be in passive mode for the testing of subjects for the purposes of the previous sections.

8.4 Passivemode:

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- 8.4.1 The passive mode of testing using the Lifeloc FC20 or ASIII should be used for testing liquids or containers of liquid for the presence or absence of alcohol.
- 8.4.2 The passive mode can be used for screening purposes on individuals who are required to provide breath samples whenever requested by a law enforcement agency. Example may include but are not limited to: probationers, work release, parolees, prison inmates, etc.



## **6.0 Idaho Standard Operating Procedure**

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## Glossary

**Approved Vendor:** A source/provider/manufacture of an approved premixed alcohol simulator solution shall be explicitly approved as a vendor of premixed alcohol simulator solutions for distribution within Idaho.

**Breath Alcohol Test:** A series of separate breath samples provided during a breath testing sequence.

**Breath Alcohol Testing Sequence:** A sequence of events as determined by the Idaho State Police Forensic Services, which may be directed by either the instrument or the Operator, but not both, and may consist of air blanks, performance verification, internal standard checks, and breath samples.

**Breath Testing Specialist (BTS):** An Operator who has completed an advanced training class taught by an employee of the Idaho State Police Forensic Services. BTS certification is valid for 26 calendar months and expires on the last day of the 26th month.

**Certificate of Analysis:** A certificate stating that the premixed ethyl alcohol solutions used for performance verification have been tested and approved for use by the ISPFS.

**Certificate of Approval:** A certificate stating that an individual breath alcohol testing instrument has been evaluated by the ISPFS and found to be suitable for forensic alcohol testing. The certificate bears the signature of an Idaho State Police Forensic Services Lab Manager, and the effective date of the instrument approval.

**Changeover Class:** A training class for currently certified personnel during which they are taught theory, operation, and proper testing procedure for a new make or model of instrument being adopted by their agency. Breath Testing Specialists attend BTS training that qualifies them to perform BTS duties related to the instrument.

**Evidentiary Test:** A breath test performed on a subject/individual for potential evidentiary or legal purposes. A distinction is made between evidentiary testing and community service or training tests performed with the instrument.

**Idaho State Police Forensic Services (ISPFS):** Formerly known as the Bureau of Forensic Services, the ISPFS is dedicated to providing forensic science services to the criminal justice system of Idaho. ISPFS is the administrative body for the breath alcohol testing program per IDAPA 11.03.01.

**MIP/MIC:** An abbreviation used to designate minor in possession or minor in consumption of alcohol.

**Operator Certification:** The condition of having satisfied the training requirements for administering breath alcohol tests as established by the ISPFS. Operator certification is valid for 26 calendar months and expires on the last day of the 26th month.

**Operator:** An individual certified by the ISPFS as qualified by training to administer breath alcohol tests.

**Operator Class:** An ISPFS-approved training class for prospective or uncertified breath alcohol Operators. Currently certified Breath Testing Specialists may teach Operator classes.

**Performance Verification:** A verification of the accuracy of the breath testing instrument utilizing a simulator and a performance verification solution. Performance verification should be reported to three decimal places. While ISPFS uses the term performance verification, manufacturers and others may use a term such as "calibration check" or "simulator check."

**Performance Verification Solution:** A premixed ethyl alcohol solution used for field performance verifications. The solution is provided by and/or approved by ISPFS.

**Recertification Class:** A training class for currently certified personnel, completion of which results in uninterrupted continuation of their Operator or BTS status for an additional 26 months.

**Waiting Period/Monitoring Period/Deprivation Period/Observation Period:** 15-minute period prior to administering a breath alcohol test, in which an officer monitors the test subject/individual.

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### List of Revisions

<u>SOP Section</u>	<u>Topic</u>	<u>Date of Revision</u>
2	Delete reference to ALS	June 1, 1995
2	0.02/0.20 solutions	June 1, 1995
3.2.1	Valid breath tests	October 23, 1995
2.1	Alco-Sensor calibration checks	May 1, 1996
2.2	Intoxilyzer 5000 Calibration Checks Effective June, 1996	May 1, 1996
2.1.2	0.003 agreement	June 1, 1996
2.1.2	Operators may run calibration checks	July 1, 1996
2.1.2	Re-run a solution within 24 hours	September 6, 1996
2.1	All 3 solutions run within a 24-hour period	September 6, 1996
2	All 3 solutions run within a 24-hour period	September 6, 1996
2.1.2	Re-running of a solution	September 26, 1996
2.1	All solutions run within a 48-hour period Reference to "three" removed	September 26, 1996 Oct. 8, 1996
2	All 3 solutions run within a 48-hour period	September 26, 1996
2	More than three calibration solutions	October 8, 1996
2	Solution values no longer called in to BFS	April 1, 1997
2.1	Alco-Sensor and Intoxilyzer 5000 calibration check	August 1, 1998
2.2	Calibration checks for the Intoxilyzer 5000	February 11, 1999
	Name change, all references made to the Bureau of Forensic Services were changed to Idaho State Police Forensic Services.	August 1999
1.6	Record Management	August 1, 1999
2	Deleted sections on relocating, repairing, recalibrating, and loaning of instruments from previous revision.	August 1, 1999

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1.2, 2.1, 2.2 3	Alco-Sensor and Intoxilyzer 5000 calibration checks Deleted sections on blood and urine samples for alcohol determination	August 1, 1999 August 1, 1999
1.6	Operator certification record management	January 29, 2001
1,2, and 3 2.1, 2.2	Reformat numbering Requirement for running 0.20 simulator solution	August 18, 2006
2.2.1.1.2.2	Changed 3-sample to "two print cards".	November 27, 2006
2.2.1.1.2.2 2.1.2.1 and 2.2.4	Deleted "simulator port" and "two print cards". Simulator temperature changed from "should" to "must".	May 14, 2007 May 14, 2007
2.2.1.1.2.2	Clarification of 0.20 calibration checks.	September 18, 2007
1.2	Added the Lifeloc FC20	February 13, 2008
1.5	Deleted requirement that the new instrument utilize the same technology if the BTS is currently certified	February 13, 2008
2	Modified the accepted range for simulator solutions to +/- 10%, eliminating the +/- 0.01 provision. Added "Established target values may be different from those shown on the bottle label"	February 13, 2008
2.2	Added Lifeloc FC20 calibration checks Intoxilyzer 5000 calibration is now section 2.3	February 13, 2008
2.	Modified to specifically allow use of the 0.20 during subject testing	February 13, 2008
Sections 1, 2, 3	General reformat for clarification. Combined Alcosensor and Lifeloc sections. Specifically, changed calibration requirement using the 0.20 reference solution from four (4) checks to two (2).	December 1, 2008
2.1.4, 2.2.3, 2.2.4, 2.2.5 And 2.2.10	Clarification: a "calibration check" consists of a pair of samples in sequence and both samples must be within the acceptable range before proceeding with subject testing. A 0.20 solution should be replaced every 20-25 samples. Clarified the correct procedure for performing a calibration check.	January 14, 2009
2.1.3, 2.1.4.1, 2.1.9	Clarification: Added " <i>before and after</i> " to the 0.08 and 0.20 calibration checks, within 24 hours of a subject test. The official time and date of the calibration check is the time and date recorded on the printout, <i>or the time and date recorded in the log, whichever corresponds to the calibration check referenced in section 2.1.3 or 2.1.4.1.</i>	July 7, 2009

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## History Page

Revision #	Effective date	History
0	8/20/2010	The entire SOP was rewritten to incorporate language changes regarding performance verifications, and to clear-up ambiguities associated with the 0.20 verification and the relevance to cases not involving an 18-8004C charge. Scope and safety sections were added. Troubleshooting, MIP/MIC sections added.
1	8/27/2010	Deletions and/or additions to sections 2, 4.3.3, 4.4.1, 4.4.3, 4.4.5, 4.6.1.1, 5.1.2, 5.1.4, 5.1.4.1, 5.1.5, 5.2.4, 5.2.5, 6, 6.2.1, 6.2.3, 6.2.4, 7, 7.1, 7.1.1, 7.1.2, 7.1.2.2, 7.1.3, 7.1.4, 7.1.5, 8.
2	11/01/2010	Section 6.2 clarified for instrument specificity, added sections 6.2.2.3, 6.2.2.3.1 and 6.2.2.4, added section 8.0 for the MIP/MIC procedure, clarified section 5.1.3 for the use of 0.20 solutions, renamed document to 6.0
3	4/23/2012	Section 5.0 modified to better reflect current practices and be in agreement with AM 1.0 for certification of premixed solutions. Updated 5.2.5 to clarify performance verifications.

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# **1      *Quantitative Analysis for Alcohol in Breath by Approved Breath Testing Instruments.***

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## **2      Scope**

This method describes the Idaho State Police Forensic Services (ISPFS) procedure, for use by agencies external to ISPFS, for the analysis of breath for the presence of volatile compounds using an approved breath testing instrument. This method provides for the quantitative analysis of ethanol.

Following all the recommendations of this external procedure will establish the scientific validity of the breath alcohol test. Failure to meet all of the recommendations within this procedure does not disqualify the breath alcohol test, but does allow for the questioning of the breath alcohol tests as it pertains to its foundation of admissibility in court. That foundation can be set, through testimony, by a Breath Testing Specialist expert or ISPFS expert in breath testing as to the potential ramifications of the deviation from the procedure as stated.

## **3      Safety**

Within the discipline of breath alcohol testing, the general biohazard safety precautions should be followed. This is due to the potential infectious materials that may be ejected from the mouth during the sampling of the breath. Caution should be taken so as the expired breath is not directed towards the officer or other unrelated bystander.

## **4      Instrument and Operator Certification**

To ensure that minimum standards are met, individual breath testing instruments, Operators, and Breath Testing Specialists (BTS) must be approved and certified by the Idaho State Police Forensic Services (ISPFS). The ISPFS will establish and maintain a list of approved instruments by manufacturer brand or model designation for use in the state.

**4.1      Approval of Breath Testing Instruments.** In order to be approved and certified each instrument must meet the following criteria:

**4.1.1** The instrument shall analyze a reference sample or analytical test standard, the results of which must agree within +/- 10% of the target value or such limits set by ISPFS.

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- 4.1.2 The certification procedures shall be adequate and appropriate for the analysis of breath specimens for the determination of alcohol concentration for law enforcement.
- 4.1.3 Any other tests deemed necessary to correctly and adequately evaluate the instrument to give accurate results in routine breath alcohol testing.
- 4.2 The ISPFS may, for cause, remove a specific instrument by serial number from evidential testing and suspend or withdraw certification thereof.
- 4.3 Operators become certified by completing a training class taught by an ISPFS certified Breath Testing Specialist (BTS). Certification is for 26 calendar months and expires the last day of the 26th month. Certification will allow the Operator to perform all functions required to obtain a valid breath alcohol test. It is the responsibility of the individual Operator to maintain their current certification; the ISPFS will not notify Operators that their certification is about to expire.
  - 4.3.1 Recertification for another 26-month period is achieved by completing an ISPFS approved Operator class prior to the end of the 26th month.
  - 4.3.2 If the individual fails to satisfactorily complete the class (including the written and practical tests), or allows their certification status to expire, he/she must retake the Operator class in order to become recertified.
  - 4.3.3 If current Operator certification is expired, the individual is not certified to run evidentiary breath alcohol tests on the instrument in question until the Operator class is completed.
    - 4.3.3.1 There are no grace periods or provisions for extension of Operator certification.
- 4.4 Breath Testing Specialists (BTS) are Operators who have completed an advanced training class and are ISPFS-certified to perform instrument maintenance, and provide both initial and recertification training for instrument Operators.
  - 4.4.1 To obtain initial BTS certification, an individual must be currently certified as an Operator of that particular instrument. BTS certification is then obtained by completing an approved BTS training class.

**NOTE:** The prior Operator status "on that particular instrument" requirement is waived for new instrumentation.
  - 4.4.2 BTS Certification is valid for 26 calendar months.
  - 4.4.3 If BTS certification is allowed to expire, the individual reverts to certified Operator status for 12 calendar months for that instrument. He/she may no longer perform any BTS specific duties relating to that particular instrument.

- 4.4.4 BTS certification is renewable by attending an approved BTS training class.
- 4.4.5 The Idaho State Police Forensic Services may revoke BTS certification for cause. Examples of what may constitute grounds for revocation may include falsification of records, failure to perform required performance verification, failure to successfully pass a BTS recertification class and failure to meet standards in conducting Operator training.
- 4.5 **Adoption of a new instrument** by an agency will require updating any BTS and Operators in that agency in the use of the new instrument.
  - 4.5.1 A currently certified **BTS** may become a certified BTS for a new instrument by completing an ISPPS approved BTS Instrumentation class.
  - 4.5.2 A currently certified **Operator** may certify on a new instrument by completing an ISPPS approved Operator Instrumentation Class for the new instrument.
  - 4.5.3 Individuals not currently certified as **Operators** must complete an Operator Class for each approved instrument.
- 4.6 **Record maintenance and management.** It is the responsibility of each individual agency to store performance verification records, subject records, maintenance records, instrument logs, or any other records as pertaining to the evidentiary use of breath testing instruments and to maintain a current record of Operator certification.
  - 4.6.1 It is the responsibility of the agency to see that the said records are stored and maintained a minimum of (3) years in accordance with IDAPA 11.03.01.
    - 4.6.1.1 Records may be subject to periodic audit by the Idaho State Police Forensic Services.
  - 4.6.2 The Idaho State Police Forensic Services will not be responsible for the storage of such records not generated by ISPPS.



## 5. Performance Verification of Breath Testing Instruments

Performance verifications aid the Breath Testing Specialist (BTS) and the Idaho State Police Forensic Services (ISPFS) in determining if a breath testing instrument is functioning correctly. Performance verifications are performed using a wet bath simulator performance verification solution. The solution is provided by and/or approved by ISPFS. The ISPFS analysis confirms the target value and acceptable range of the solutions used for the verification and includes the acceptable values on the Certificate of Analysis for each solution. Note: The ISPFS confirmed target values should be taken directly from the official ISPFS Certificate of Analysis for each solution lot and not from the bottles or from the vendors certificate of analysis.

### 5.1 Alco-Sensor and Lifeloc FC20--Portable Breath Testing Instrument Performance Verification

- 5.1.1 The Alco-Sensor and Lifeloc FC20 portable breath testing instrument performance verification is run using approximately 0.08 and/or 0.20 performance verification solutions provided by and/or approved by ISPFS.
- 5.1.2 The performance verification using the 0.08 and 0.20 performance verification solutions consist of two samples.
- 5.1.3 A performance verification of the Alco-Sensor and Lifeloc FC20 instruments using a 0.08 or 0.20 performance verification solution must be performed within 24 hours, before or after an evidentiary test to be approved for evidentiary use. Multiple breath alcohol tests may be covered by a single performance verification. Reference 5.1.4.1 for clarification on the use of the 0.20 solution in this capacity.
  - 5.1.3.1 A 0.08 performance verification solution should be replaced with fresh solution approximately every 25 verifications or every calendar month, whichever comes first.
- 5.1.4 A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 verifications or until it reaches its expiration date, whichever comes first

**NOTE:** The 0.20 performance verification was implemented for the sole purpose of supporting the instruments' results for an 18-8004C charge. Failure to timely perform a 0.20 performance verification will not invalidate tests performed that yield results at other levels or in charges other than 18-8004C.

- 5.1.4.1 The 0.20 performance verification satisfies the requirement for performance verification within 24 hours, before or after an evidentiary test at any level. The 0.20 performance verification solution should not be used routinely for this purpose.

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- 5.1.5 Acceptable results for a 0.08 or 0.20 performance verification is a pair of samples in sequence that are both within +/- 10% of the performance verification solution target value. Target values and ranges of acceptable results are included in a certificate of analysis for each solution lot series, prepared by, and available from, the ISPFS.

**NOTE:** Due to external factors associated with changing a performance verification solution the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results are obtained. However, if results after a total of three test series for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. The suggested troubleshooting procedure should be followed if the initial performance verification does not meet the acceptance criteria.

- 5.1.6 Temperature of the simulator must be between 33.5°C and 34.5°C in order for the performance verification results to be valid.

**NOTE:** The simulator may need to warm for approximately 15 minutes to ensure that the metal lid is also warm. If the lid is cold, condensation of alcohol vapor may occur producing low results.

- 5.1.7 Performance verification solutions should only be used prior to the expiration date on the label.
- 5.1.8 An agency may run additional performance verification solution levels at their discretion.
- 5.1.9 The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log, whichever corresponds to the performance verification referenced in section 5.1.3 or 5.1.4.1.

## 5.2 Intoxilyzer 5000/EN Performance Verification

Intoxilyzer 5000/EN instruments must have a performance verification with each evidentiary test. If the performance verification is within the acceptable range for the lot of solution being used, then the instrument will be approved and the resulting breath samples will be deemed valid for evidentiary use.

- 5.2.1 Intoxilyzer 5000/EN performance verification is run using 0.08 and/or 0.20 performance verification solutions provided by and/or approved by ISPFS.
- 5.2.2 During each evidentiary breath alcohol test using the Intoxilyzer 5000/EN, a performance verification will be performed as directed by the instrument

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testing sequence and recorded as SIM CHK on the printout. If the SIM CHK is not within the acceptable range for the solution lot being used, the testing sequence will abort and no breath samples will be obtained.

5.2.3 A two sample performance verification using a 0.08 performance verification solution should be run and results logged each time a solution is replaced with fresh solution (this is not a requirement but only a check that the instrument is connected correctly prior to an evidentiary test being performed). A 0.08 performance verification solution should be replaced with fresh solution approximately every 100 samples or every calendar month, whichever comes first.

5.2.4 A 0.20 performance verification should be run and results logged once per calendar month and replaced with fresh solution approximately every 25 verifications or until it reaches its expiration date, whichever comes first

**NOTE:** The 0.20 performance verification was implemented for the sole purpose of supporting the instruments' results for a 18-8004C charge. Failure to timely perform a 0.20 performance verification will not invalidate tests performed that yield results at other levels or in charges other than 18-8004C.

5.2.5 Acceptable results for an independent 0.08 or 0.20 performance verification, which is not performed during a breath testing sequence, are a pair of back-to-back samples that are both within +/- 10% of the performance verification solution target value. Performance verifications that are performed during a breath testing sequence are acceptable with a single test result within +/- 10% of the solution target value. Target values and ranges of acceptable results for each solution lot series are included in a certificate of analysis, prepared by, and available from, the ISPFS.

**NOTE:** Due to external factors associated with changing a performance verification solution the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results are obtained. However, if results after a total of three test series for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and performance verification results are within the acceptable range. Follow the suggested troubleshooting procedure if the initial performance verification does not meet the acceptance criteria.

5.2.6 The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log.

5.2.7 Performance verification solutions should only be used prior to the expiration date as marked on the label.

- 5.2.8 Temperature of the simulator must be between 33.5°C and 34.5°C in order for the performance verification results to be valid.
- 5.2.9 An agency may run additional performance verification solution levels at their discretion.
- 5.2.10 The BTS must set the correct acceptable range limits and performance verification solution lot number in the instrument before proceeding with evidentiary testing.

## 6. Evidentiary Testing Procedure

Proper testing procedure by certified Operators is necessary in order to provide accurate results. Instruments used in Idaho measure alcohol in the breath, not the blood, and report results as grams of alcohol in 210 liters of breath.

- 6.1 Prior to evidentiary breath alcohol testing, the subject/individual should be monitored for at least fifteen (15) minutes. Any foreign objects/materials which have the potential to enter the instrument/breath tube or may present a choking hazard should be removed prior to the start of the 15 minute waiting period. During the monitoring period the subject/individual should not be allowed to smoke, drink, eat, or belch/burp/vomit/regurgitate.

NOTE: If a foreign object/material is left in the mouth during the entirety of the 15 minute monitoring period, any potential external alcohol contamination will come into equilibrium with the subject/individual's body water and/or dissipate so as not to interfere with the results of the subsequent breath alcohol test.

- 6.1.1 The breath alcohol test must be administered by an Operator currently certified in the use of the instrument.
- 6.1.2 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.
- 6.1.3 The Operator may elect a blood test in place of the breath alcohol test if there is a failure to complete the fifteen minute monitoring period successfully.
- 6.1.4 During the monitoring period, the Operator must be alert for any event that might influence the accuracy of the breath alcohol test.
- 6.1.4.1 The Operator must be aware of the possible presence of mouth alcohol as indicated by the testing instrument. If mouth alcohol is suspected or indicated, the Operator should begin another 15-minute waiting period before repeating the testing sequence.
- 6.1.4.2 If, during the 15-minute waiting period, the subject/individual vomits or regurgitates material from the stomach into the subject/individual's breath pathway, the 15-minute waiting period must begin again.
- 6.1.4.3 If there is doubt as to the events occurring during the 15 minute monitoring period, the officer should look at results of the duplicate breath samples for evidence of potential alcohol contamination. For clarification see section 6.2.2.2.

- 6.2 A complete breath alcohol test includes two (2) valid breath samples taken during the testing sequence and preceded by air blanks. The duplicate breath samples performed with a portable breath testing instrument should be approximately 2 minutes apart, or more (for the ASIII's and the FC20's). Refer to section 6.2.2.2.

**NOTE:** A deficient or insufficient sample does not automatically invalidate a test sample.

- 6.2.1 If the subject/individual fails or refuses to provide a duplicate, adequate sample as requested by the Operator, the single test result shall be considered **valid**.

6.2.1.1 The Operator may repeat the testing sequence as required by circumstances.

6.2.1.2 The Operator should use a new mouthpiece for each series of tests.

- 6.2.2 A third breath sample is required if the first two results differ by more than 0.02.

6.2.2.1 Unless mouth alcohol is indicated or suspected, it is **not** necessary to repeat the 15-minute waiting period to obtain a third breath sample.

6.2.2.2 The results for duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject/individual's breath pathway, show consistent sample delivery, and indicates the absence of RFI as a contributing factor to the breath results.

6.2.2.3 In the event that all three samples fall outside the 0.02 correlation, and the officer suspects that mouth alcohol could have been a contributing factor, then they should restart the 15 minute observation period and retest the subject.

6.2.2.3.1 If the officer does not suspect that mouth alcohol was present, and that the sample variability was due to a lack of subject cooperation in providing the samples as requested, then the samples can be considered valid if all three samples are above the per se limit of prosecution.

6.2.2.4 If all three samples fall outside the 0.02 correlation, the officer may at their discretion elect to have a blood sample drawn for analysis in lieu of retesting the subject's breath alcohol concentration.

- 6.2.3 The Operator should log test results and retain printouts, if any, for possible use in court.
- 6.2.4 If a subject/individual fails or refuses to provide a duplicate, adequate sample as requested by the Operator, the results obtained are still considered valid by the ISPFS, provided the failure to supply the requested samples was the fault of the subject/individual and not the Operator.
- 6.2.5 If the second or third samples are lacking due to instrument failure, the Operator should attempt to utilize another instrument or have blood drawn.

## 7. Troubleshooting Procedure

Proper testing procedure by certified Operators is necessary in order to provide accurate results.

- 7.1 Performance verification: If, when performing the periodic performance verification, the instrument falls outside the limits of the verification, the troubleshooting guide should be used.

**NOTE:** This is a guide for troubleshooting performance verifications outside the verification limits and the procedure is recommended to streamline and isolate the potential cause of the problem. Strict adherence to the guidelines is not required.

- 7.1.1 The three sources of uncertainty when performing the periodic performance verifications are in the simulator setup and Operator technique, the simulator performance verification solution, and the instrument calibration itself.

- 7.1.2 If the first performance verification is outside the verification limits, the simulator setup and technique of the Operator performing the verification should be evaluated. The simulator should be evaluated to ensure that it is hooked up properly, uses short hoses, is properly warmed, is within temperature, the Operator blow technique is not too hard or soft, and that the Operator does not stop blowing until after the sample is taken.

- 7.1.2.1 The performance verification should be run a second time

- 7.1.2.2 If the performance verification is within the verification limits on the second try, the instrument passes the performance verification.

- 7.1.3 If the second performance verification is outside the verification limits, then the performance verification solution should be evaluated next.

- 7.1.3.1 The performance verification solution should be changed to a fresh solution.

- 7.1.3.2 The solution should be warmed for approximately 15 minutes, or until the temperature is within range, and the simulator lid is as warm as the simulator jar.

- 7.1.3.3 The performance verification may then be repeated.

- 7.1.4 If the third performance verification is outside the verification limits, the instrument must be taken out of service and sent to the ISPFS or an approved service provider.

- 7.1.5 Upon return from service, the instrument should be recertified by ISPFS before being put back into service.

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7.2 Thermometers:

- 7.2.1 If a bubble forms in the thermometer, the Operator or BTS can place the thermometer in a freezer to draw the mercury (or equivalent) into the bulb of the thermometer. This should disperse the bubble.

## 8. Minors in Possession/Minors in Consumption Procedure

Breath testing instruments certified by ISPFS are often used in investigating violations of Idaho Code § 23-949 (punishment set forth by I.C. § 18-1502) or Idaho Code § 23-604 (punishment set forth by I.C. 18-1502), wherein a person under twenty-one (21) years of age is deemed to have possessed and consumed alcohol. Unlike the Driving Under the Influence statutes and their associations with per se limits of 0.08 and 0.20, a specific level of alcohol is not required to prove a violation of I.C. § 23-949 or § 23-604. There is no requirement that the State prove the person is impaired by alcohol. Rather, the presence or absence of alcohol is a determining factor for proving the offense. Therefore, there is a different standard operating procedure associated with this type of charge. The main purpose of the procedure outlined below is to rule out "mouth alcohol" as a potential contributing factor to the results given during the breath testing done for MIP/MIC cases.

- 8.1 15 minute observation period: The monitoring/observation period is not required for the MIP/MIC procedure. The duplicate samples, separated by approximately 2 minutes or more and within the 0.02 correlation, provide the evidence of consistent sample delivery, the absence of "mouth alcohol" as well as the absence of RFI (radio frequency interference) as a contributing factor to the results of the breath test.
- 8.2 MIP/MIC requirements:
  - 8.2.1 The breath alcohol test must be administered by an operator currently certified in the use of that instrument.
  - 8.2.2 The instrument used must be certified by ISPFS.
    - 8.2.2.1 The instrument only needs to be initially certified by ISPFS. Initial certification shows that the instrument responds to alcohols and not to acetone.
    - 8.2.2.2 The instrument used does not need to meet other requirements set forth in previous sections of this SOP. It does not need to be checked regularly or periodically with any of the 0.08 or 0.20 solutions.
  - 8.2.3 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test.
  - 8.2.4 The officer should have the individual being tested remove all loose foreign material from their mouth before testing. The officer may allow the individual to briefly rinse their mouth out with water prior to the breath testing.

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8.2.5 Any material containing alcohol left in the mouth during the entirety of the breath testing sampling could contribute to the results in the breath testing sequence. (For clarification refer to section 8.1)

8.3 Procedure:

A complete breath alcohol test includes two (2) valid breath samples taken from the subject and preceded by an air blank. The duplicate breath samples do not need to be consecutive samples. The individual breath samples should be 2 minutes or more apart, to allow for the dissipation of potential mouth alcohol contamination.

**NOTE:** A deficient or insufficient sample does not automatically invalidate a test sample.

8.3.1 If the subject/individual fails or refuses to provide a duplicate adequate sample as requested by the operator, the single test result will be considered valid.

8.3.1.1 The operator may repeat the testing sequence as required by circumstances.

8.3.1.2 The operator should use a **new mouthpiece** for each individual and for each series of tests (i.e. complete set of breath testing samples).

8.3.2 A third breath sample is required if the first two results differ by more than 0.02.

8.3.2.1 The results for duplicate breath samples should correlate within 0.02 to indicate the absence of alcohol contamination in the subject's breath pathway (mouth alcohol), show consistent sample delivery, and indicates the absence of RFI as a contributing factor to the breath results.

8.3.2.2 In the event that all three samples fall outside the 0.02 correlation, and the officer suspects that mouth alcohol could have been a contributing factor, then they should administer a 15 minute observation period and then retest the subject. If mouth alcohol is not suspected, then the officer may reinstruct the individual in the proper breath sample technique and retest the subject without administering a 15 minute observation.

8.3.3 The operator should manually log test results and/or retain printouts for possible use in court.

8.3.4 The instrument **should not** be in passive mode for the testing of subjects for the purposes of the previous sections.

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8.4 Passive mode:

- 8.4.1 The passive mode of testing using the Lifeloc FC20 or ASIII should be used for testing liquids or containers of liquid for the presence or absence of alcohol.
- 8.4.2 The passive mode can be used for screening purposes on individuals who are required to provide breath samples whenever requested by a law enforcement agency. Example may include but are not limited to: probationers, work release, parolees, prison inmates, etc.



# **Standard Operating Procedure**

## **Breath Alcohol Testing**

**Idaho State Police  
Forensic Services  
August 1994**  
(Revised 12/2008 and 1/14/2009, effective date 1/15/2009)

## Glossary

**Breath Test:** A series of separate breath samples provided during a breath testing sequence.

**Breath Testing Sequence:** A sequence of events as determined by the Idaho State Police Forensic Services, which may be directed by either the instrument or the operator, but not both, and may consist of air blanks, calibration checks, internal standard checks, and breath samples.

**Breath Testing Specialist (BTS):** An operator who has completed an advanced training class taught by an employee of the Idaho State Police Forensic Services. BTS certification is valid for 26 calendar months and expires on the last day of the 26th month.

**Idaho State Police Forensic Services (ISPFS):** Formerly known as the Bureau of Forensic Services, the ISPFS is dedicated to providing forensic science services to the criminal justice system of Idaho. ISPFS employees are qualified to perform all duties of a BTS.

**Calibration Check:** A check of the accuracy of the breath-testing instrument utilizing a simulator and ethanol-based reference solution(s) provided by the ISPFS or approved vendor(s) and standardized by the ISPFS. Calibration checks should be reported to three decimal places.

**Certificate of Analysis:** A certificate stating that the reference solutions used for calibration checks have been tested and approved for use by the ISPFS.

**Certificate of Approval:** A certificate stating that an individual breath alcohol-testing instrument has been evaluated by the ISPFS and found to be suitable for forensic alcohol testing. The certificate bears the signature of the Idaho State Police Forensic Services Manager/Major, and the effective date of the instrument approval.

**Changeover Class:** A training class for currently certified personnel during which they are taught theory, operation, and proper testing procedure for a new make or model of instrument being adopted by their agency. Breath Testing Specialists attend BTS training that qualifies them to perform BTS duties related to the instrument.

**Operator Certification:** The condition of having satisfied the training requirements for administering breath alcohol tests as established by the ISPFS. Operator certification is valid for 26 calendar months and expires on the last day of the 26th month.

**Operator:** An individual certified by the ISPFS as qualified by training to administer breath alcohol tests.

**Operator Class:** An ISPFS-approved training class for prospective or uncertified breath test operators. Currently certified Breath Testing Specialists may teach operator classes.

**Recertification Class:** A training class for currently certified personnel, completion of which results in uninterrupted continuation of their Operator or BTS status for an additional 26 months.

**Reference Solution:** An ethanol-based solution of known concentration provided by the ISPFS or approved vendor(s) and standardized by ISPFS, and used to conduct calibration checks.

**Simulator Check (SIM CHK):** A type of calibration check that is run with each individual breath test.

**Waiting Period/Monitoring Period/Deprivation Period:** Mandatory 15-minute period prior to administering a breath alcohol test, in which an officer monitors the test subject.

## Breath Alcohol Standard Operating Procedure

### List of Revisions

<u>SOP Section</u>	<u>Topic</u>	<u>Date of Revision</u>
2	Delete reference to ALS	June 1, 1995
2	0.02/0.20 solutions	June 1, 1995
3.2.1	Valid breath tests	October 23, 1995
2.1	Alco-Sensor calibration checks	May 1, 1996
2.2	Intoxilyzer 5000 Calibration Checks Effective June, 1996	May 1, 1996
2.1.2	0.003 agreement	June 1, 1996
2.1.2	Operators may run calibration checks	July 1, 1996
2.1.2	Re-run a solution within 24 hours	September 6, 1996
2.1	All 3 solutions run within a 24-hour period	September 6, 1996
2	All 3 solutions run within a 24-hour period	September 6, 1996
2.1.2	Re-running of a solution	September 26, 1996
2.1	All solutions run within a 48-hour period Reference to "three" removed	September 26, 1996 Oct. 8, 1996
2	All 3 solutions run within a 48-hour period	September 26, 1996
<del>2</del>	<del>More than three calibration solutions</del>	<del>October 8, 1996</del>
2	Solution values no longer called in to BFS	April 1, 1997
2.1	Alco-Sensor and Intoxilyzer 5000 calibration check	August 1, 1998
2.2	Calibration checks for the Intoxilyzer 5000	February 11, 1999
	Name change, all references made to the Bureau of Forensic Services were changed to Idaho State Police Forensic Services.	August 1999
1.6	Record Management	August 1, 1999
2	Deleted sections on relocating, repairing, recalibrating, and loaning of instruments from previous revision.	August 1, 1999
1.2, 2.1, 2.2	Alco-Sensor and Intoxilyzer 5000	August 1, 1999

	calibration checks	
3	Deleted sections on blood and urine samples for alcohol determination	August 1, 1999
1.6	Operator certification record management	January 29, 2001
1,2, and 3 2.1, 2.2	Reformat numbering Requirement for running 0.20 simulator solution	August 18, 2006
2.2.1.1.2.2	Changed 3-sample to "two print cards".	November 27, 2006
2.2.1.1.2.2 2.1.2.1 and 2.2.4	Deleted "simulator port" and "two print cards". Simulator temperature changed from "should" to "must".	May 14, 2007 May 14, 2007
2.2.1.1.2.2	Clarification of 0.20 calibration checks.	September 18, 2007
1.2	Added the Lifeloc FC20	February 13, 2008
1.5	Deleted requirement that the new instrument utilize the same technology if the BTS is currently certified	February 13, 2008
2	Modified the accepted range for simulator solutions to +/- 10%, eliminating the +/- 0.01 provision. Added "Established target values may be different from those shown on the bottle label"	February 13, 2008
2.2	Added Lifeloc FC20 calibration checks Intoxilyzer 5000 calibration is now section 2.3	February 13, 2008
2.	Modified to specifically allow use of the 0.20 during subject testing	February 13, 2008
Sections 1, 2, 3	General reformat for clarification. Combined Alcosensor and Lifeloc sections. Specifically, changed calibration requirement using the 0.20 reference solution from four (4) checks to two (2).	December 1, 2008
2.1.4, 2.2.3, 2.2.4, 2.2.5 And 2.2.10	Clarification: a "calibration check" consists of a pair of samples in sequence and both samples must be within the acceptable range before proceeding with subject testing. A 0.20 solution should be replaced every 20-25 samples. Clarified the correct procedure for performing a calibration check.	January 14, 2009



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**Section 2: Calibration Checks of Approved Breath Testing Instruments, pages 3-5**

**Section 3: Subject Testing Procedure, pages 6-7**

## **1. Instrument and Operator Certification**

To ensure that minimum standards are met, individual breath testing instruments, operators, and breath testing specialists (BTS) must be approved and certified by the Idaho State Police Forensic Services (ISPFS). The ISPFS will establish and maintain a list of approved instruments by manufacturer brand or model designation for use in the state.

- 1.1 **Approval of Breath Testing Instruments.** In order to be approved and certified each instrument must meet the following criteria:
  - 1.1.1 The instrument shall analyze a reference sample or analytical test standard, the results of which must agree within +/- 10% of the target value or such limits set by ISPFS.
  - 1.1.2 The certification procedures shall be adequate and appropriate for the analyses of breath specimens for the determination of alcohol concentration for law enforcement.
  - 1.1.3 Any other tests deemed necessary to correctly and adequately evaluate the instrument to give accurate results in routine breath alcohol.
- 1.2 The ISPFS may, for cause, remove a specific instrument by serial number from evidential testing and suspend or withdraw certification thereof.
- 1.3 **Operators become certified by completing a training class taught by an ISPFS certified Breath Testing Specialist (BTS).** Certification is for 26 calendar months and expires the last day of the 26th month. Certification will allow the operator to perform all functions required to obtain a valid breath test. It is the responsibility of the individual operator to maintain their current certification; the ISPFS will not notify operators that their certification is about to expire.
  - 1.3.1 Recertification for another 26-month period is achieved by completing an ISPFS approved Operator class prior to the end of the 26th month.
  - 1.3.2 If the individual fails to satisfactorily complete the class (including the written and practical tests), or allows their certification status to expire, he/she must retake the operator class in order to become re-certified.
  - 1.3.3 Current Operator certification is voided, and the individual is not certified to run evidentiary breath tests on the instrument in question until the operator class is completed.
  - 1.3.3 There are no grace periods or provisions for extension of operator certification.
- 1.4 **Breath Testing Specialists (BTS) are Operators who have completed an advanced training class and are ISPFS-certified to perform instrument maintenance, and provide both basic and recertification training for instrument operators.**

- 1.4.1 To obtain initial BTS certification, an individual must be currently certified as an Operator of that particular instrument. BTS certification is then obtained by completing an approved BTS training class.
- 1.4.2 Certification is valid for 26 calendar months.
- 1.4.3 If BTS certification is allowed to expire, the individual reverts to certified Operator status for 12 calendar months for that instrument. He/she may no longer perform any BTS duties relating to that particular instrument.
- 1.4.4 BTS certification is renewable by attending an approved BTS training class.
- 1.4.5 The Idaho State Police Forensic Services may revoke BTS certification for cause. Examples may include falsification of records, failure to perform required calibration checks, failure to successfully pass a BTS re-certification class and failure to meet standards in conducting operator training.
- 1.5 Adoption of a new instrument by an agency will require updating any BTS and Operators in that agency.
  - 1.5.1 A currently certified BTS may become a certified BTS for a new instrument by completing an instrumentation class.
  - 1.5.2 A currently certified Operator may certify on a new instrument by completing an ISPPS approved Operator Instrumentation Class for the new instrument.
  - 1.5.3 Individuals not currently certified as Operators must complete an Operator Class for each approved instrument.
- 1.6 Record maintenance and management. It is the responsibility of each individual agency to store calibration records, subject records, maintenance records, instrument logs, or any other records as pertaining to the evidentiary use of breath testing instruments and to maintain a current record of operator certification.
  - 1.6.1 It is the responsibility of the agency to see that the said records are stored and maintained a minimum of (3) years in accordance with IDAPA 11.03.01.
  - 1.6.2 The Idaho State Police Forensic Services will not be responsible for the storage of such records not generated by it.
    - 1.6.2.1 Records may be subject to periodic review by the Idaho State Police Forensic Services.

## 2. Calibration Checks of Breath Testing Instruments

Calibration checks aid the Breath Testing Specialist (BTS) and the Idaho State Police Forensic Services (ISPFS) in determining if a breath-testing instrument is functioning correctly. Calibration checks are performed using a reference sample or analytical standard of ethanol-water, wet-bath simulator solutions prepared and analyzed by the ISPFS or an approved vendor. The ISPFS analysis establishes the target value and acceptable range of the solutions used for the checks and includes them on the Certificate of Analysis. Note: The *ISP established target values may be different from those shown on the bottle label.*

### 2.1 Alco-Sensor and Lifeloc FC20 – Portable Breath Testing Instrument Calibration Checks

2.1.1 The Alco-Sensor and Lifeloc FC20 portable breath testing instrument calibration check is run using approximately 0.08 and/or 0.20 reference solutions provided by the Idaho State Police Forensic Services or approved vendor and following the procedure outlined in the Alco-Sensor and Lifeloc FC20 instrument manuals.

2.1.2 The calibration checks using the 0.08 and 0.20 reference solutions consist of two samples separated by air blanks.

2.1.3 A calibration check of the Alco-Sensor and Lifeloc FC20 instruments using a 0.08 reference solution must be performed within 24 hours of a subject test to be approved for evidentiary use. Multiple breath tests may be covered by a single calibration check.

2.1.3.1 A 0.08 reference solution should be replaced with fresh solution approximately every 20 - 25 checks or every month, whichever comes first.

2.1.4 A 0.20 reference solution should be run and results logged once per calendar month and replaced with fresh solution approximately every 20 - 25 checks.

**NOTE:** The 0.20 calibration check is run in support of excessive consumption; Idaho Code section 18-8004c.

2.1.4.1 The 0.20 reference solution check satisfies the requirement for a calibration check within 24 hours of a subject test. The 0.20 reference solution should not be used routinely for this purpose.

2.1.5 Acceptable results for a 0.080 or 0.20 calibration check is a pair of samples in sequence that are both within +/- 10% of the reference solution target value. Target values and ranges of acceptable results are included in a certificate of analysis for each solution lot series, prepared by, and available from, the ISPFS.

**NOTE:** Due to external factors associated with changing a reference solution (examples include: ambient air in the sample chamber, temperature fluctuation) the results of the initial calibration check may not be within the

acceptable range, therefore the calibration check may be repeated until a pair of satisfactory results are obtained however, if results after a total of three runs for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPPS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and calibration check results are within the acceptable range.

- 2.1.6 Temperature of the simulator must be between 33.5°C and 34.5°C in order for the calibration check results to be valid.
- 2.1.7 Calibration check solutions should only be used prior to the expiration date on the label.
- 2.1.8 An agency may run additional calibration checks at their discretion.
- 2.1.9 The official time and date of the calibration check is the time and date recorded on the printout, or in the absence of the printer, the time and date recorded in the log.

## 2.2 Intoxilyzer 5000/EN Calibration Checks

Intoxilyzer 5000/EN instruments must have a calibration check with each subject test. If the calibration check is acceptable the instrument will be approved and the resulting breath samples will be deemed valid for evidentiary use.

- 2.2.1 Intoxilyzer 5000/EN calibration check is run using 0.08 and/or 0.20 reference solutions provided by the Idaho State Police Forensic Services or approved vendor and following the procedure outlined in the Intoxilyzer 5000/EN manual.
- 2.2.2 During each subject breath test using the Intoxilyzer 5000/EN, a 0.08 calibration check will be performed as directed by the instrument testing sequence and recorded as SIM CHK on the printout. If the SIM CHK is not within the acceptable range for the solution, the testing sequence will abort and no breath samples will be obtained.
- 2.2.3 A two sample calibration check using a 0.08 reference solution should be run and results logged each time a solution is replaced with fresh solution. A 0.08 reference solution should be replaced with fresh solution approximately every 100 samples or every month, whichever comes first.
- 2.2.4 A two sample calibration check using a 0.20 reference solution should be run and results logged once per calendar month and replaced with fresh solution approximately every 20-25 samples.

**NOTE:** The 0.20 calibration check is run in support of excessive consumption; Idaho Code section 18-8004c.

- 2.2.5 Acceptable results for a 0.080 or 0.20 calibration check is a pair of samples in sequence that are both within +/- 10% of the reference solution target value. Target values and

ranges of acceptable results are included in a certificate of analysis for each solution lot series, prepared by, and available from, the ISPFS.

NOTE: Due to external factors associated with changing a reference solution (examples include: ambient air in the sample chamber, temperature fluctuation) the results of the initial calibration check may not be within the acceptable range, therefore the calibration check may be repeated until a pair of satisfactory results are obtained however, if results after a total of three runs for any solution (equivalent to six tests) are still unsatisfactory, contact the appropriate ISPFS Laboratory. The instrument should not be used for evidentiary testing until the problem is corrected and calibration check results are within the acceptable range.

- 2.2.6 Calibration check information should be entered in the instrument log. The official time and date of the calibration check is the time and date recorded on the printout, or in the absence of a printer, the time and date recorded on the log.
- 2.2.7 Calibration check solutions should only be used prior to the expiration date as marked on the label.
- 2.2.8 Temperature of the simulator must be between 33.5°C and 34.5°C in order for the calibration check results to be valid.
- 2.2.9 An agency may run additional calibration checks at their discretion.
- 2.2.10 Recommended calibration check procedure: Run <Escape><Escape> <C> using the 0.20 reference solution, rinse and dry the simulator, refill with fresh 0.080 and run <Escape> <Escape> <C> before putting the instrument back in service.
- 2.2.11 The BTS must set the correct acceptable range limits and reference solution lot number in the instrument before proceeding with subject testing.

### 3. Subject Testing Procedure

Proper testing procedure by certified operators is necessary in order to provide accurate results that will be admissible in court. Instruments used in Idaho measure alcohol in the breath, not the blood, and report results as grams of alcohol in 210 liters of breath.

**3.1 Prior to evidential breath alcohol testing, the subject must be monitored for fifteen (15) minutes.**

Any material which absorbs/adsorbs or traps alcohol should be removed from the mouth prior to the start of the 15 minute waiting period. During the monitoring period the subject should not be allowed to smoke, drink, eat, or belch/burp.

3.1.2 The breath test must be administered by an operator currently certified in the use of the specific model of instrument used.

3.1.3 False teeth, partial plates, or bridges installed or prescribed by a dentist or physician does not need to be removed to obtain a valid test.

3.1.4 The operator may elect a blood test in place of the breath alcohol test if there is a failure to complete the fifteen minute monitoring period successfully.

3.1.5 During the monitoring period, the operator must be alert for any event that might influence the accuracy of the breath test.

3.1.5.1 The operator must be aware of the possible presence of mouth alcohol as indicated by the testing instrument. If mouth alcohol is suspected or indicated, the operator should begin another 15-minute waiting period before repeating the testing sequence.

3.1.5.2 If, during the 15-minute waiting period, the subject vomits or is otherwise suspected of regurgitating material from the stomach, the 15-minute waiting period must begin again.

3.2 A breath alcohol test includes two (2) valid breath samples taken during the testing sequence and separated by air blanks.

NOTE: A deficient or insufficient sample does not automatically invalidate a test.

3.2.1 If the subject fails or refuses to provide a second or third adequate sample as requested by the operator, the single test result may be considered valid.

3.2.2.1 The operator may repeat the testing sequence as required by circumstances.

3.2.2.2 The operator should use a new mouthpiece for each series of tests.

- 3.2.3 A third breath sample is required if the first two results differ by more than 0.02.
- 3.2.3.1 Unless mouth alcohol is indicated or suspected, it is not necessary to repeat the 15-minute waiting period to obtain a third breath sample.
- 3.2.4 The operator should log test results and retain printouts for possible use in court. If there is no printout, the log page becomes the legal record of the test results.
- 3.2.5 If a subject fails or refuses to provide a second or third sample as requested by the operator, the results obtained are still considered valid by the ISPFS, provided the failure to supply the requested samples was the fault of the subject and not the operator.
- 3.2.6 If the second or third samples are lacking due to instrument failure, the operator should attempt to utilize another instrument or have blood drawn.



**ORIGINAL**

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STATE OF IDAHO  
COUNTY OF KOOTENAI } ss  
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**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,	)	
	)	
Plaintiff,	)	CASE NUMBER CR-13-0005363
	)	Misd
V.	)	
	)	MOTION IN LIMINE
JESSE CARL RIENDEAU,	)	
	)	
Defendant.	)	
	)	

COMES NOW, the above named defendant by and through his attorney, Jay Logsdon, Deputy Public Defender, and hereby moves the Court for an Order to suppress and preclude the prosecuting attorney from introducing into evidence any evidence of the breath test result.

Idaho Code 18-8004(4) mandates that testing for alcohol concentration be done in accordance with methods approved by the Idaho State Police. In supposed compliance with that mandate and authority, the Idaho State Police has issued both "Standard Operating Procedures: Breath Alcohol Testing," ("SOP" or "SOPs") (available at <http://www.isp.idaho.gov/forensic/documents/6.0IdahoBreathAlcoholStandardOperatingProcedureRev3.pdf>) which purports to establish procedures for the maintenance and operation of breath testing equipment as well as training and operations manuals ("manual" or "manuals") for the various breath testing devices, including the Lifeloc device used in this case. Previously, failure to abide by so-called "regulations" set forth in the standard operating procedures and training manuals renders the test inadmissible as evidence. See, e.g., *State v.*

**MOTION IN LIMINE**

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*Mazzuca*, 132 Idaho 868 (Ct. App., 1990) (failure to calibrate machine renders test inadmissible); see also *State v. Charan*, 132 Idaho 341, 343 (Ct. App., 1998); *State v. Phillips*, 117 Idaho 609, 613 (Ct. App., 1990); *State v. Bell*, 115 Idaho 36, 39-40 (Ct. App., 1988).

Previously, failure to properly run a 0.20 calibration check also resulted in the inadmissibility of the breath result. *In Re the Matter of the Driving Privileges of Christopher S. Wilkins*, Case No. CV 38364 (2<sup>nd</sup> Judicial District of Idaho, June 2, 2008), by the Honorable District Judge John Bradbury; see also *In Re the Matter of the Driving Privileges of Kelly Gene Burke*, Case No. CV 2007-140 (2<sup>nd</sup> Judicial District of Idaho, November 14, 2007).

In *Wilkins*, the District Court considered the failure to properly calibrate an Intoxilyzer breath testing machine by only running two instead of four 0.20 calibration tests (Intoxilyzer machines have slightly different requirements for calibration than Alco-sensors). The District Court in *Wilkins* held that the breath test results were not admissible, referring to its prior decision *In Re the Matter of the Driving Privileges of Kelly Gene Burke*, Case No. CV 2007-140 (2<sup>nd</sup> Judicial District of Idaho, November 14, 2007), holding that "the police are required to conduct the appropriate number of [calibration check] tests."

Previously, Idaho case law, indicated that the requirements of the manual control where it differs with the SOPs. *In re Schroeder* provided an instructive summary of how to address conflicts between the SOPs and an operations manual and holds that the requirements of the manual control. *In re Schroeder*, 147 Idaho 476 (Ct. App., 2009) (discusses conflict between SOPs and manual and holds that the manual controls and examines the relevant caselaw). Illustratively, in *Schroeder*, the Court of Appeals addressed a conflict between the SOPs for the Intoxilizer 5000 and the manual as it relates to the need to restart a test when the subject burps. The Court noted:

The SOP thus made no reference to belching as a circumstance that would affect administration of the test.

The Intoxilyzer 5000 Manual, however, specifies that belching is a factor. It states: "During [the 15-minute monitoring period], the subject may not smoke, consume alcohol, eat, belch, vomit, use chewing tobacco, or have gum or candy in the mouth. If belching or vomiting does occur or something is found in the mouth, have it removed and wait an additional 15 minutes." (Emphasis added.)

Schroeder, relying on these instructions in the Intoxilyzer 5000 Manual, contends that the monitoring period must recommence if the subject belches, while the ITD argues that, per the SOP, only regurgitation of stomach material requires that the monitoring period be restarted. The ITD contends that the SOP and the Intoxilyzer 5000 Manual should be harmonized by interpreting the belching referenced in the Intoxilyzer 5000 Manual to include only belching that results in the regurgitation of stomach material as specified in the SOP.

....

The SOP and the Intoxilyzer 5000 Manual conflict with respect to the circumstances in which the monitoring period must be restarted-the Intoxilyzer 5000 Manual plainly directs that the monitoring period must be started anew if any belching occurs, not just belching accompanied by regurgitation. **We conclude that for matters on which they conflict, the Intoxilyzer 5000 Manual governs.** In reaching this determination, we apply well-established standards of statutory interpretation. The first of these principles requires that where two inconsistent statutes appear to apply to the same subject matter, the more specific statute will control over the more general one. *Huyett v. Idaho State University*, 140 Idaho 904, 908, 104 P.3d 946, 950 (2004); *Westway Const., Inc. v. Idaho Transp. Dept.*, 139 Idaho 107, 115, 73 P.3d 721, 729 (2003); *Gooding County v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002). Here, the SOP is more general, for it applies to various breath testing devices approved by the ISP, whereas the Intoxilyzer 5000 Manual is written exclusively for that instrument and is therefore less likely to have been written in a way that might sacrifice specific detail for broad applicability.

See *Schroeder*, 147 Idaho at 480-81.

At roughly the same time, the Court of Appeals held in *Wheeler v. Idaho Transportation Department*, 148 Idaho 378 (2009) that the word "should" indicates a recommendation and not a requirement when it appears in the SOPs.

Shortly thereafter, a succession of changes to the SOPs and the Reference Manual for the Intoxilyzer 5000 took place. The latest changes to the SOPs were made effective as of January 16, 2013. The latest changes to the Reference Manual were made December 16, 2010.

The Reference Manual now opens with the statement:

Idaho State Police (ISP) has authority and responsibility in the state of Idaho for the calibration and certification of instruments, maintenance of instrumentation, quality control guidelines, and analytical methods pertaining to the evidentiary collection of breath alcohol samples. Idaho State Police Forensic Services (ISPFS) is the functional unit within ISP that is authorized to administer the Breath Alcohol Testing Program.

**Analytical Methods (AM), also known as Standard Operating Procedures (SOP), shall supersede and take legal precedent over any and all other forms of documentation (e.g. reference manuals, training manuals, and training materials) produced or maintained by the Idaho State Police as it pertains to the Breath Alcohol Testing Program in the state of Idaho. If discrepancies exist between differing forms of procedural documentation, the Analytical Method shall be the binding document.** (emphasis added).

The reference manuals produced and maintained by ISPFS are for reference only as it pertains to the form and function of the different breath alcohol testing instruments used within the state of Idaho. If questions arise as to the functionality of the instrument, the reference manual may be used to help answer those questions. The reference manual is a reference tool used by the end user agency to help the Breath Testing Specialists and Operators maintain knowledge as to the functionality of the instrument and to refresh their memories as to the different functions and options within the different instruments.

This is evidently a direct response to the Court's holding in *Schoeder*. Apparently, the manuals are no longer to be given the effect of the law.

Similarly, the SOPs have been modified so that the word "must" has been replaced by the word "should" in the following instances:

1. The necessity to have the correct acceptable range limits and performance verification standard lot number set in the instrument prior to evidentiary testing- 2.2.11 (1/15/2009) cf. 5.2.10 (1/16/2013).

2. The need to monitor the subject for fifteen minutes prior to the test to ensure there is no alcohol being regurgitated or in the mouth. See 3.1, 3.1.5, 3.1.5.1, 3.1.5.2 (1/15/2009) cf. 6.1, 6.1.4, 6.1.4.1, 6.1.4.2 (1/16/2013).

These changes occurred between the April 23, 2012 version of the SOPs and the latest installment.

No indication is given for the reasoning behind these revisions. Presumably, a person facing a criminal charge would prefer that strict and careful procedures be used when the police are breath testing. It is certainly not the case that these are not important parts of breath testing.

Mouth alcohol is an enormous issue with breath testing. See Caddy, Sobell, and Sobell, Alcohol Breath Tests: Criterion Times for Avoiding Contamination by 'Mouth Alcohol', 10(6)

BEHAVIOR RESEARCH METHODS AND INSTRUMENTATION 814-18 (1978); Breath-Alcohol Concentration May Not Always Reflect the Concentration of Alcohol in Blood, 18 J.

ANALYTICAL TOXICOLOGY 225 (July/Aug. 1994); Colorado Department of Health, 6(11)

Drinking/Driving L. Letter 5 (May 29, 1987); Kechagias, Jonsson, Franzen, Andersson & Jones, Reliability of Breath-Alcohol Analysis in Individuals with Gastroesophageal Reflux Disease,

44(4) J. FORENSIC SCIS. 814 (1999); Gaylard, Sambuk & Morgan, Reductions in Breath Ethanol Readings in Normal Male Volunteers Following Mouth Rinsing with Water at Differing

Temperatures, 22 ALCOHOL & ALCOHOLISM 113 (1987); P. Price, Intoxilyzer: A Bread Testing

Device?, 15(4) Drinking/Driving L. Letter 52 (1996) (slope detector failures); Ethanol Content of Various Foods and Soft Drinks and their Potential for Interference with a Breath-Alcohol Test,

22 J. ANALYTICAL TOXICOLOGY 181 (May/June 1998); Michael P. Hlastala, Ph.D., Wayne J.E.

Lamm, M.A. and James Nesci, J.D., The Slope Detector Does Not Always Detect the Presence

of Mouth Alcohol, THE CHAMPION, (National Association of Criminal Defense Lawyers), 57-60 (March 2006).

The defendant would direct the Court's attention to the warnings of Judge Lansing, dissenting in *Wheeler*.

It is helpful to begin with a brief review of the development of the statutory law concerning testing of drivers for alcohol concentration in the breath, blood or urine. In 1972, when the DUI statutes were codified in Title 49 of the Idaho Code, the legislature added the following provision to I.C. § 49-1102: "Chemical analysis of blood, urine or breath for the purpose of determining the blood alcohol level shall be performed by a laboratory operated by the Idaho department of health or by a laboratory approved by the Idaho department of health under the provisions of approval and certification standards to be set by that department." 1972 Idaho Sess. Laws, ch. 155, § 1 at 342. The stated purpose of the amendment was to "provide for better uniformity and accuracy" in testing. Statement of Purpose, HB 580 (RS 3616) (1972). The DUI statutes were later recodified into Title 18, and in 1987, the legislature added the following provision to I.C. § 18-8004(4):

Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho department of health and welfare or by any other method approved by health and welfare shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

1987 Idaho Sess. Laws, ch. 122, § 2 at 247, 249-50. The legislative purpose of this provision making the test results admissible in judicial proceedings without witness testimony concerning the reliability of the testing equipment and procedure was, in part, to "make the practice uniform around the state ... and to avoid the 'economic burden to the state to have to furnish witnesses to provide superfluous verification.' " Statement of Purpose, HB 284 (RS13389) (1987). Subsequently, the responsibility for setting testing standards for laboratories and other test methods was shifted to the Department of Law Enforcement, 1988 Idaho Sess. Laws, ch. 47, § 4 at 54, 65, which was later renamed the Idaho State Police (ISP). 2000 Idaho Sess. Laws, ch. 469, § 1 at 1450, 1456. As the legislative statements of purpose indicate, this statutory scheme is intended to streamline trials and reduce the costs of prosecution while at the same time assuring the accuracy of the tests. **It can meet this objective and can accord with due process and demands of fundamental fairness only if there actually exist promulgated standards for administration of BAC tests that ensure accurate and reliable test results.** (emphasis added). In other words, the quid

pro quo for the convenience and economy of admitting test results pursuant to I.C. § 18-8004(4) is that the ISP must promulgate ascertainable standards that, if complied with, will yield accurate BAC testing.

If a driver fails a breath test that was administered in conformity with ISP standards, significant consequences follow for the driver, quite apart from any prosecution for driving under the influence. The individual's driver's license is immediately seized by a law enforcement officer and the driver will be given a notice of suspension and a temporary driving permit. I.C. § 18-8002A(5)(a). If no hearing is requested, the driver's license will be suspended by the Idaho Transportation Department for a period of 90 days for the first failure of an evidentiary test and for a period of one year for a second and any subsequent failure of an evidentiary test within a five-year period. I.C. § 18-8002A(4).FN5 The driver has a right to request a hearing within seven days of the notice of suspension. I.C. § 18-8002A(7). If a hearing is requested, the burden will be upon the driver to show cause why the license should not be suspended. I.C. § 18-8002A(7). A driver may do this by showing, among other things, that the BAC test administered by the officer was "not conducted in accordance with the requirements of § 18-8004(4)." I.C. § 18-8002A(7). The hearing will be an informal proceeding before a hearing officer designated by the Idaho Transportation Department, I.C. § 8002A(7). Because this administrative hearing is not a criminal or judicial proceeding, the constitutional protections afforded to one charged with a crime do not apply-there is no right to appointed counsel for the indigent nor any right to confront adverse witnesses. In addition, the rules of evidence that govern judicial proceedings do not apply, I.C. § 67-5251, I.R.E. 101(b), and the burden of proof rests on the driver rather than on the State. I.C. § 18-8002A(7).

FN5. Restricted driving privileges may be allowed after a first test failure. I.C. § 18-8002A(4).

The ISP has not formally promulgated administrative rules prescribing testing equipment or requirements for its maintenance and operation. Instead, the ISP has announced its approved breath testing methods through standard operating procedures manuals and training manuals describing how to use approved breath test instruments, including the Intoxilyzer 5000. See I.D.A.P.A.

11.03.01.013.03.FN6 As to the Intoxilyzer 5000 that is at issue here, the standards are found in the Standard Operating Procedures Manual (SOP). This Court has treated such documents as "rules" for purposes of judicial review because they constitute the only materials by which the ISP has acted upon the I.C. § 18-8002A(3) authorization for the ISP to "prescribe by rule" approved testing instruments and methods.

FN6. This administrative regulation promulgated by the Idaho State Police states: "Breath tests shall be administered in conformity with standards established by the department. Standards shall be developed for each type of breath testing

instrument used in Idaho, and such standards shall be issued in the form of standard operating procedures and training manuals.”

One of the ISP standards for maintenance and operation of the Intoxilyzer 5000, and the one at issue here, is expressed in SOP 2.2.1.1.2.1, which states, “The 0.08 solution should be changed approximately every 100 calibration checks or every month whichever comes first.” The referenced 0.08 solution is a solution that is used to calibrate the Intoxilyzer 5000 instrument to ensure that it will accurately measure a test subject's breath alcohol content. The point of contention here is the meaning of the word “should” in this directive.

The majority holds that the word is recommendatory, not mandatory. While I agree that “should” in many contexts connotes only a recommendation, not a requirement, its interpretation must depend upon the context and the purpose of the provision in which the word appears. In my view, the majority's interpretation that “should” as used in the SOP denotes only actions that are recommended but not mandatory-and hence are optional-is not a reasonable interpretation of the ISP's intent and is not consistent with other sections of the SOP which make it plain that proper calibration is essential to the accurate functioning of the Intoxilyzer 5000. These other sections include SOP 1.2, which states, “Each approved breath-testing instrument is approved or disapproved for evidentiary testing based on the results of calibration checks performed as described in Section II.” SOP 1.2.1.2 states that for an Intoxilyzer 5000, “a valid calibration check must be performed with every breath test.” SOP 1.2.2 provides “if a calibration check produces results outside the acceptable range of values, the instrument may not be approved for evidentiary use for breath tests associated with that calibration check.” By these provisions, the ISP has plainly acknowledged that proper calibration, with a properly constituted calibration solution, is necessary to insure accurate test results. Hence, there is a clear recognition and intent that some standards are required for such calibration and calibration solutions.

**But a “standard” that is merely a recommendation, and hence optional, is no standard at all-it is merely something that the officers maintaining and operating the Intoxilyzer 5000 may do if they wish or may disregard.**

(emphasis added). As noted in footnote 4 of the majority opinion, the SOP uses the word “should” numerous times throughout the provisions governing use of the Intoxilyzer 5000 and another type of equipment, the Alco-Sensor. If this word conveys only a recommendation and not a requirement, then despite the acknowledgement in the SOP that proper calibration is essential for the accurate operation of the instrument, the ISP has adopted no actual ascertainable standard for the frequency with which the calibration solution must be changed for either the Intoxilyzer 5000 or the Alco-Sensor (SOP 2.1.4.1.1 and 2.2.1.1.2.1), for the simulator temperature for calibration checks of either the Intoxilyzer 5000 or the Alco-Sensor (SOP 2.1.2.1 and 2.2.4), for whether the operator need check the temperature before conducting a calibration check (SOP 2.1.2.1.1), for whether or



when the Alco-Sensor must be taken out of service after unsatisfactory calibration check runs (SOP 2.1.2.2.1.1), for whether calibration solutions for the Alco-Sensor and the Intoxilyzer 5000 may be used after the expiration date on the label, or, if so, for how long thereafter (SOP 2.1.4 and 2.2.1.1.1), for whether calibration solutions for the Intoxilyzer 5000 may be used when they do not produce values in an acceptable range (SOP 2.2.1.1.2), for whether the calibration check information must be entered into an instrument log (SOP 2.2.3.1), for whether the person monitoring the subject during the fifteen-minute waiting period before administration of the breath test must be a certified breath test operator (SOP 3.1.1), and for whether a new mouthpiece need be used for repeat tests (SOP 3.2.2.2). In other words, if “should” means “optional,” then the ISP’s “standards” for use of the Intoxilyzer 5000 are full of gaping holes-and seeming contradictions between the obvious acknowledgement that proper calibration is necessary for reliable test results and the utter absence of any defined standards for conducting such calibrations. The majority opines that to interpret “should” as meaning “must” would render the distinction between the two words “meaningless and illusory.” I respectfully respond that to interpret the word “should” in this circumstance as merely recommendatory and optional, renders “meaningless and illusory” every provision of the SOP in which that word is used. This could not possibly comply with the ISP’s statutory responsibility to prescribe “requirements” for evidentiary testing and calibration of testing equipment under I.C. §§ 18-8002A(3) and 18-8004(4). **And if there are no adequately defined requirements, then the Intoxilyzer 5000 breath tests results are not admissible under I.C. § 18-8004(4) because there is then no defined “method” approved by the ISP.** (emphasis added).

*Id.* at 386-89, citing *Schroeder*, 147 Idaho at 479 n. 3; *Archer v. State, Dep’t of Transportation*, 145 Idaho 617, 620-21 (Ct.App.2008); *State v. DeFranco*, 143 Idaho 335, 337 (Ct.App.2006).

It is also interesting to note that the ISP, by using SOPs in the place of regulations, has made an end-run around the requirements of the Idaho Administrative Procedures Act, specifically I.C. §§ 67-5220 – 67-5232 and I.D.A.P.A. 44.01. Thus, the various changes the ISP makes to its breath testing procedures receive no public scrutiny prior to implementation, which seems to fly in the face of what the legislature had in mind in passing I.C. § 18-8004(4).

For the above reasons, the ISP has failed to comply with the requirements of I.C. § 18-8004(4) and provide proper rules by which the reliability of breath testing can be established. This lack of standards and controls and total lack of public oversight of the method the ISP uses

vitiates the legitimacy of such tests granted by the legislature to the ISP and makes all such testing too unreliable for use at a criminal trial under I.C. § 18-8004.

WHEREFORE, the Defendant requests the Court enter an Order precluding the prosecutor from introducing into evidence the breath test results. Defendant respectfully requests the right to present oral argument and evidence and cross-examine the Plaintiff and its witnesses/affiants at any hearing held hereon. Requested time for hearing is 15 minutes.

DATED this 6 day of May, 2013.

THE LAW OFFICE OF THE PUBLIC  
DEFENDER OF KOOTENAI COUNTY

BY: Jay Logsdon  
JAY LOGSDON  
DEPUTY PUBLIC DEFENDER

### CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same as indicated below on the 6 day of May, 2013, addressed to:

Coeur d'Alene Prosecutor FAX 769-2326

       Via Fax  
X Interoffice Mail

Quincy Strange

**ORIGINAL**

Jay Logsdon, Deputy Public Defender  
The Law Office of the Public Defender of Kootenai County  
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Coeur d'Alene, Idaho 83816  
Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 8759

STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
FILED:

2013 MAY -3 PM 2:44

CLERK DISTRICT COURT

DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

**STATE OF IDAHO,**

Plaintiff,

V.

**JESSE CARL RIENDEAU,**

Defendant.

**CASE NUMBER CR-13-0005363  
Misd**

**AMENDED MEMORANDUM IN  
SUPPORT OF MOTION TO SUPPRESS  
RESULTS OF BREATH TEST**

COMES NOW, Jesse Riendeau, the above named defendant, by and through his attorney,  
Jay Logsdon, Deputy Public Defender, and hereby submits the following Memorandum in  
support of his Motion to Suppress previously filed with this Court.

**I. ISSUE PRESENTED**

**A. The defendant's consent to the breath test was nonconsensual.**

**II. FACTS**

On March 21, 2013, Officer Rios of the Coeur d'Alene Police Department read a Notice  
of Suspension for Failure of Evidentiary Testing to the defendant. He then waited fifteen  
minutes and conducted a breath test using the Intoxilyzer 5000. The results of that test were .175  
and .181. The defendant was charged with driving under the influence.

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### III. ARGUMENT

#### **A. The defendant's consent to the breath test was nonconsensual.**

The Fourth Amendment to the United States Constitution guarantees every citizen the right to be free from unreasonable searches and seizures. *State v. Ramirez*, 145 Idaho 886, 888 (Ct.App. 2008); *State v. Salois*, 144 Idaho 344, 347 (Ct.App. 2007); *State v. Cerino*, 141 Idaho 736, 737 (Ct.App. 2005). Its purpose is "to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order to 'safeguard the privacy and security of individuals against arbitrary invasions.' " *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)).

The administration of a blood alcohol test constitutes a seizure of the person and a search within the purview of the Fourth Amendment to the United States Constitution. *Schmerber v. California*, 384 U.S. 757, 767 (1966); *State v. Diaz*, 144 Idaho 300, 302 (2007); *State v. DeWitt*, 145 Idaho 709, 711-12 (Ct.App.2008). Searches and seizures performed without a warrant are presumptively unreasonable. *Diaz*, 144 Idaho at 302; *DeWitt*, 145 Idaho at 712. To overcome the presumption, the State bears the burden of establishing two prerequisites. *Id.* First, the State must prove that a warrantless search fell within a well-recognized exception to the warrant requirement. *Id.* Second, the State must show that even if the search is permissible under an exception to the warrant requirement, it must still be reasonable in light of all of the other surrounding circumstances. *Id.*

In *Missouri v. McNeely*, --- S.Ct.---, 2013 WL 1628934 (U.S.Mo. 2013), the Supreme

**MEMORANDUM IN SUPPORT OF  
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Court of the United States held that an officer's belief that a person is currently intoxicated and need to conduct an evidentiary test before the alcohol in their system evaporates does not *per se* create exigent circumstances that allow the officer to forego seeking a warrant.

The state of Idaho, like the other forty-nine states, has adopted what is called an implied consent law. *McNeely, supra*, at \*12. In Idaho, implied consent means that a person who has accepted the privilege of operating a motor vehicle upon Idaho's highways, see *DeWitt*, 145 Idaho at 712, provided that evidentiary testing is administered by a peace officer with reasonable grounds for suspicion of DUI, will physically consent to an evidentiary test. See I.C. § 18-8002(1). Implied consent has nothing to do with consenting legally because it was erroneously believed that a person could not legally refuse an evidentiary test where an officer had probable cause to believe they were intoxicated. See *State v. Woolery*, 116 Idaho 368, 372-374 (1989).

The text of *Woolery* will be reproduced below for the Court's edification:

As explained by the Wisconsin Supreme Court in *State v. Zielke*, 137 Wis.2d 39, 403 N.W.2d 427 (1987), "the implied consent law is an important weapon in the battle against drunk driving in this state. Neither the law, its history nor common sense allows this court to countenance its use as a shield by the defense to prevent constitutionally obtained evidence from being admitted at trial." 403 N.W.2d 427, 434.

The South Dakota Supreme Court ruling in *State v. Buckingham*, 240 N.W.2d 84 (1976), that noncompliance with the implied consent statutes rendered the blood sample and test results inadmissible in a driving while intoxicated manslaughter prosecution, was overruled just one year later in *State v. Hartman*, 256 N.W.2d 131 (S.D.1977). The court explained:

The Buckingham decision was without the benefit of argument from the state on the question of whether use of the "exclusionary rule" was necessary where there is a violation of the implied consent statutes. Upon further consideration, this court feels that it is necessary to modify the *Buckingham* decision.... Our consideration of the implied consent statutes must be prefaced upon the United

**MEMORANDUM IN SUPPORT OF  
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States Supreme Court's decision in *Schmerber v. California* [citations omitted in quote] ... The exclusionary rule is a judicially created means of protecting the rights of citizens under the Fourth Amendment and Art. VI, § 11 of the South Dakota Constitution as a deterrent to unlawful police conduct. However, evidence obtained in violation of statutory rights is not inadmissible per se unless the statutory rights are of constitutional proportions or there exists no other method of deterring future violations of the rights which the legislature has granted to its citizens.

*Hartman*, 256 N.W.2d 131, 134-135. In holding that the results of the blood test were admissible, the court explained that **despite the fact the legislature created a specific right of a driver to refuse to submit to a test to determine the alcohol content of his blood, failure to comply with the procedure as set forth in the implied consent statutes does not require suppression of the test results as long as the testing procedure complied with the driver's constitutional rights.** [emphasis added].

The Idaho Legislature has acknowledged a driver's *physical ability to refuse* to submit to an evidentiary test, but it did not create a *statutory right* for a driver to withdraw his previously given consent to an evidentiary test for concentration of alcohol, drugs or other intoxicating substances. [emphasis in original].

Importantly, the pre-1983 statute, I.C. § 49-352, covering implied consent to extract blood for a blood alcohol test, stated: "If such person having been placed under arrest and having thereafter been requested to submit to such chemical test refuses to submit to such chemical test the test shall not be given but the department shall suspend his license or permit to drive...." The 1984 legislature repealed I.C. § 49-352, the legislative precursor of § 18-8002, and adopted § 18-8002 as a part of the new chapter 80 of title 18. In addition to maintaining the pre-1983 implied consent language and the 1983 deletion of the language just discussed, this enactment added a section making it clear that a driver does not have the right to consult with an attorney before submitting to an evidentiary test. The state submits that the elimination of the statutory provision that the test shall not be given if it is refused, the continued use of the pre-1983 implied consent language, the addition of a specific statutory provision making it very clear that a driver does not have a right to consult with an attorney before submitting to the evidentiary test, along with the statement of purpose enacted as a part of the 1983 Act, reflect the legislative "get tough" policy. This legislative "get tough" policy did not include the creation of a statutory right for a driver to refuse to submit to an evidentiary test requested by an officer who has reasonable cause to believe that such driver is under the influence.

**MEMORANDUM IN SUPPORT OF  
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The Oregon Supreme Court in *State v. Newton*, 636 P.2d 393 (1981), explained that the concept of implied consent is a statutory fiction which, at first, appears to be theoretically contradictory[:]

The contradiction disappears, however, when it is realized that the words “consent” and “refusal” are not used as antonyms, because they are not used in the same sense. “Consent” describes a legal act; “refusal” describes a physical reality. By implying consent, the statute removes the right of a licensed driver to lawfully refuse, but it cannot remove his or her *physical power* to refuse. As another court put it:

The obvious reason for acquiescence in the refusal of such a test by a person who as a matter of law is “deemed to have given his consent” is to avoid the violence which would often attend forcible tests upon recalcitrant inebriates.

**It is firmly established that a drunken driver has no *right* to resist or refuse such a test** [citations omitted in quote]. [emphasis added]. It is simply because such a person has the *physical power* to make the test impractical, and dangerous to himself and those charged with administering it, that it is excused upon an indication of his unwillingness.... *Bush v. Bright*, 264 Cal.App.2d 788, 790, 792, 71 Cal.Rptr. 123 at 125 (1968) (original emphasis).

Thus refusal as contemplated by the statute is something other than withholding of consent because consent is legally implied. It is a refusal to comply with the consent which has already been given as a condition of a license to drive. The purpose of a warning of license suspension following a refusal ... is to overcome an unsanctioned refusal by threat instead of force. It is not to reinstate a right to choice, but rather to nonforcibly enforce the driver's previous implied consent.

636 P.2d 393 at 397-398 (original emphasis). See also *State v. Hoehne*, 78 Or.App. 479, 717 P.2d 237 (1986); *State v. Spencer*, 305 Or. 59, 750 P.2d 147 (1988); *Pears v. State*, 672 P.2d 903 (Alaska App.1983), rev'd on other grounds, 698 P.2d 1198 (Alaska 1985); *Wirz v. State*, 577 P.2d 227 (Alaska 1978).

The Idaho Legislature has not created a statutory right to refuse to submit to an evidentiary test to determine a driver's blood alcohol level. It is difficult to believe that the Idaho Legislature would provide an individual with the statutory right to prevent the state from obtaining highly relevant evidence when a law enforcement officer has reasonable cause to believe that individual has committed a crime-whether it would be driving under the influence, vehicular manslaughter, sale of controlled substances, or murder. **If the driver's constitutional right to be free from unreasonable searches and seizures is complied with, the state should**

**MEMORANDUM IN SUPPORT OF  
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**not be prevented from obtaining such relevant evidence as the alcohol content of the driver's blood. [emphasis added].**

To put it more succinctly, the Court found that:

*[i]n Schmerber, the United States Supreme Court recognized that a warrantless seizure of the blood of a driver, as long as probable cause exists and the withdrawal of the blood is done in a reasonable fashion, does comply with the provisions of the fourth amendment.*

*Id.* at 374. However, the Idaho Supreme Court was manifestly wrong in its interpretation of *Schmerber v. California*, 384 U.S. 757 (1966) and has now been overruled by the United States Supreme Court's ruling in *McNeely*. See *McNeely*, *supra*, at \*5. Therefore, a warrantless evidentiary test in a DUI case is presumptively unreasonable, and a person does have the right to refuse to do the test.

Further, the state may not punish a citizen for exercising or standing on their constitutional rights. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000).

The state does not have the power to require consent to a search in violation of the Constitution to use the road. *Woolery*, 116 Idaho at 372 quoting *Hartman*, 256 N.W.2d at 134–135. Certainly, it would be shocking that a state legislature could do to drivers what it cannot do to prisoners. *Hudson v. Palmer*, 468 U.S. 517 (1984) (“We have repeatedly held that prisons are not beyond the reach of the Constitution. No ‘iron curtain’ separates one from the other.”).

Rather than simply state that those who choose to live in general population rather than solitary impliedly consent to random shakedowns, the Court has held that prison regulations that inhibit rights are reviewed for their reasonableness. *Turner v. Safley*, 482 U.S. 78, 84–85 (1987).

*McNeely* holds that it is not reasonable to search a driver's body for signs of intoxication absent a

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warrant or when an exception to the warrant requirement applies. *McNeely*, supra, at \*5.

Therefore, the Court has reviewed the reasonableness of the warrantless evidentiary test in DUI cases and indicated that the Constitution requires more than probable cause and the withdrawal of blood being done in a reasonable fashion. Cf. *Woolery*, 116 Idaho at 374. The Constitution requires a warrant.

Now this Court is confronted with what this means for defendants who have been read the Notice of Suspension for Failure of Evidentiary Testing (otherwise known as the ALS form). This form is read by Idaho police to defendants and states

I have reasonable grounds to believe that you were driving or were in physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances. **You are required by law to take one or more evidentiary test(s)** to determine the concentration of alcohol or presence of drugs or other intoxicating substances in your body. After submitting to the test(s) you may, when practical, at your own expense, have additional test(s) made by a person of your own choosing. You do not have the right to talk to a lawyer before taking any evidentiary test(s) to determine the alcohol concentration or presence of drugs or other intoxicating substances in your body. [emphasis added].

The form goes on to list a litany of punishments that will result if a person refuses. The obvious problem with this warning is that the law requiring those tests is unconstitutional. Further, an officer may not threaten to do what he is not legally or constitutionally authorized to do. *Bumper v. North Carolina*, 391 U.S. 543, 548-550 (1968); *State v. Smith*, 144 Idaho 482, 488-89 (2007). The policeman's threat vitiates any consent. *Id.*

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In this case, the defendant was read the ALS form. Therefore, his consent was involuntary and the result of the test must be excluded under the Idaho Constitution Article I § 17. *State v. Guzman*, 122 Idaho 981, 995 (1992).

#### IV. CONCLUSION

The defendant respectfully requests that this Court grant his Motion to Suppress the results of the breath test in this case because his consent to the search was involuntary and therefore the test was carried out in violation of his rights under the Constitutions of the United States and the State of Idaho.

DATED this 2 day of May, 2013.

THE LAW OFFICE OF THE PUBLIC  
DEFENDER OF KOOTENAI COUNTY

BY:

  
JAY LOGSDON  
DEPUTY PUBLIC DEFENDER

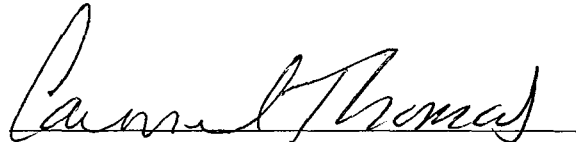
#### CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same as indicated below on the 3 day of May, 2013, addressed to:

Coeur d'Alene Prosecutor FAX 769-2326

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**MEMORANDUM IN SUPPORT OF  
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<b>Description</b>	CR 2013-5363 Riendeau, Jesse Carl 20130520 Jury Trial Status Call -Motion to Suppress - Limine Judge Watson Clerk -Nancy Albers		
<b>Date</b>	5/20/2013	<b>Location</b>	1K-COURTROOM4
<b>Time</b>	<b>Speaker</b>	<b>Note</b>	
01:00:24 PM	Judge Watson	Calls Case PA/DA/Defendant present	
01:06:08 PM		hearing on 5/10/13 - Officer Rios testified - 3 videos admitted as exhibits - I have reviewed all 3 videos -	
01:07:08 PM	PA -Roy Gowey	Would also have some testimony on the Motion in Limine	
01:07:20 PM		Calls W#1 on Motion in Limine	
01:07:33 PM	Clerk	Swears W#1	
01:07:52 PM	W#1		
01:07:56 PM	DA- Megan Marshall	Objection to this witness- Not given appropriate notice and information	
01:08:17 PM		Don't feel his testimony is relevant - this is legal argument	
01:08:33 PM	PA -Roy Gowey	Argues - Has been disclosed as a witness - The same witness disclosed in another similar motion with the same attorney	
01:13:16 PM	Judge Watson	Clearly at trial required to disclose witnesses - but the hearing on 5/10/13 and today are preliminary issues -	
01:13:47 PM		Overule Objection	
01:13:52 PM	W#1 - Jerermy Johnston	Forensic Scientist Idaho State Police - Explains Educations and Certifications	
01:14:55 PM		Fimilar with Standard Procedures on Blood Alcohol Testing - I wrote them - I have testified to those a number of times - been qualified as expert -	
01:15:46 PM		I have seen the Motion in this case - In light of case law some changes have been made - Fimilar with changes in procedure -	
01:17:24 PM	DA- Megan Marshall	Objection	
01:18:14 PM	W#1 - Jeremy Johnston	Change in language regarding the words Should vs Must - explains - Changes were made - 15 min observation period changed to Should instead of Must explains -	
01:19:40 PM		Other safeguards in place to establish	
01:19:59 PM	DA- Megan	Objection	

	Marshall	
<u>01:20:02 PM</u>	Judge Watson	Overuled
<u>01:20:11 PM</u>	W#1 - Jeremy Johnston	Explains the Must items in procedure -
<u>01:20:43 PM</u>		Performance Verifications are musts - If those are not done - then can't establish results valid
<u>01:21:50 PM</u>		Regarding .02 difference -
<u>01:22:04 PM</u>	DA- Megan Marshall	Objection
<u>01:22:09 PM</u>	Judge Watson	Overuled
<u>01:22:14 PM</u>	W#1 - Jeremy Johnston	If both met could establish test was accurate and reliable
<u>01:22:56 PM</u>		Explains what the .02 difference rules out -
<u>01:23:47 PM</u>		Last Changes on 1/16/13 - I was the one making the changes - Then out for Scientific review then managment review and then legal review before can be put in effect the ones done on 1/16/13 went through that procedure -
<u>01:24:59 PM</u>	PA -Roy Govey	Nothing further
<u>01:25:03 PM</u>	DA- Megan Marshall	cross
<u>01:25:06 PM</u>	W#1 - Jeremy Johnston	Employed by Idaho State Police
<u>01:25:12 PM</u>		Immediate Supervisor Ann Nord - been with ISP - Since 7/18/03
<u>01:25:37 PM</u>		Must vs Should - Not sure if must or should on expired solution
<u>01:26:51 PM</u>		If outside of performance verification couldn't establish test was reliable
<u>01:27:12 PM</u>		Most recent changes 1/16 I wrote those changes - was a review process Fimlar with IDAPA
<u>01:27:49 PM</u>		I am not aware of all the provisions to make changes to IDAPA - Beleive for IDAPA changes need public review
<u>01:28:42 PM</u>		Fimlar with Intoxilizer 5000 Manuel - explains - Don't know if in conflict with standard operating manual
<u>01:30:38 PM</u>		I am a forensic specialist - but for the court to decide
<u>01:30:55 PM</u>	DA- Megan Marshall	Nothing further
<u>01:31:02 PM</u>	PA -Roy	Redirect

	Gowey	
<u>01:31:07 PM</u>	W#1 - Jeremy Johnston	The Manuals are more like educational tool - Explains - The Rules binding on what need to do to establish valid test - Those are in the Standard Operating Procedure -
<u>01:33:02 PM</u>	PA -Roy Gowey	Nothing further
<u>01:33:05 PM</u>	DA- Megan Marshall	Nothing further
<u>01:33:22 PM</u>	PA -Roy Gowey	Rests on the evidence
<u>01:33:29 PM</u>	DA- Megan Marshall	Request court take judicial notice of items submitted 5/6/13
<u>01:33:53 PM</u>	PA -Roy Gowey	No objection
<u>01:33:56 PM</u>	Judge Watson	The Court will do so
<u>01:34:20 PM</u>		Are you requesting I take time to read all documents
<u>01:34:47 PM</u>		Will need to vacate this trial and reset - Don't have time to do that now
<u>01:35:01 PM</u>	DA- Megan Marshall	Reset the argument
<u>01:35:09 PM</u>	Judge Watson	Vacate Trial - and Reset PTC and Trial
<u>01:36:04 PM</u>		PTC 6/21/13 @ 1:00 p.m. - Jury Trial 7/1/13 @ 8:30 a.m.
<u>01:36:23 PM</u>		Will set a date before that to have argument and Decision
<u>01:36:24 PM</u>	END	

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<b>Description</b>	CR 2013-5363 Riendeau, Jesse Carl 20130510 Motion to Suppress Pretrial Judge Watson Clerk - Nancy Albers <i>Nancy K Albers</i>		
<b>Date</b>	5/10/2013	<b>Location</b>	1K-COURTROOM4
<b>Time</b>	<b>Speaker</b>	<b>Note</b>	
<u>03:40:15 PM</u>	Judge Watson	Calls Case PA/DA/Defendant present	
<u>03:40:33 PM</u>	DA - Jay Logsdon	Motion to Suppress Stop and Breath test results	
<u>03:40:54 PM</u>	PA - David Judd	Warrantless situation	
<u>03:40:59 PM</u>		Preliminary Issues to address -	
<u>03:41:09 PM</u>		I have 3 videos - Stipulate to admission	
<u>03:41:18 PM</u>	DA - Jay Logsdon	Stipulation for purposes of today's hearing	
<u>03:42:41 PM</u>	Judge Watson	Admits Exh 1 & 2 & 3	
<u>03:42:53 PM</u>	PA - David Judd/DA - Jay Logsdon	Agree for today's hearing only need Exh 1 & 2	
<u>03:42:58 PM</u>	Judge Watson	Any other stipulations	
<u>03:43:04 PM</u>	PA - David Judd	Calls W#1	
<u>03:43:16 PM</u>	Clerk	Swears W#1	
<u>03:43:17 PM</u>	W#1 Mario Rios		
<u>03:43:32 PM</u>	PA - David Judd	Stipulate to officers training and experience ?	
<u>03:43:34 PM</u>	DA - Jay Logsdon	No stipulation on that	
<u>03:43:41 PM</u>	W#1 Mario Rios	Patrol Officer for City of Coeur d'Alene - 12 yrs - Explains training and experience	
<u>03:44:19 PM</u>		P.O.S.T. Certified in Idaho - Education regarding Driving under the Influence - Successfully completed all my training - Explains Duties of Patrol Officer - Investigate DUI cases -	
<u>03:45:18 PM</u>		I work graveyard shift perform those duties regularly - I also monitor traffic	

<u>03:45:56 PM</u>		On Duty 3/31/13 - appx 1:00 a.m. - I had just left Public Safety building responding to missing person call - I was on Harrison - West Bound Coeur d'Alene Kootenai County Idaho
<u>03:46:49 PM</u>		Vehicle caught my attention - was in bike lane eastbound on Harrison -
<u>03:48:25 PM</u>		The vehicle was over the white line - near the curb line - the vehicle was over the white line 2 - 3 seconds appx 50 ft - I was able to pull to northside of lane on shoulder and turned around to locate the vehicle that just passed me - When I turned around the vehicle turned right on 10th street southbound
<u>03:50:11 PM</u>		The conditions were clear - no snow on road - I caught up to vehicle as vehicle stopped and driver was exiting vehicle - I didn't block the vehicle in - parked in front of home - I saw the driver - he was stepping out of vehicle approaching me - Said come on man - I indicated stopped for violation saw on Harrison - He had a bag on food in his hand - Was slow and fumbling some He was more concerned the stop was at his residence - I talked to him about what I had seen and signs of possible DUI - Asked if drinking he said no and asked if any illegal drugs and he said no
<u>03:53:35 PM</u>	W#1 Mario Rios	I conducted a DUI investigation based on my observations - explains
<u>03:54:07 PM</u>		trained to conduct DUI Investigations - Explains -
<u>03:55:11 PM</u>		Explains the Standard Field Sobriety tests - explains standard tests
<u>03:56:06 PM</u>		Point system -
<u>03:56:10 PM</u>		Did Gaze Nystagmus test - Had 6 pts on that test
<u>03:57:38 PM</u>		Explains Heel to Toe Test -
<u>03:58:10 PM</u>		He performed those tests - Had 6 pts on that test also
<u>04:01:29 PM</u>		We next did the one leg stand - explains -
<u>04:02:30 PM</u>		He had 3 pts on that test
<u>04:03:07 PM</u>		I placed the Defendant in custody and transported to the Public Safety building.
<u>04:03:28 PM</u>		At the jail - did pre-booking process - I then check their mouth for any foreign
<u>04:05:04 PM</u>		Checked the Defendant's mouth it was clear of any substances
<u>04:05:20 PM</u>	W#1 Mario Rios	Advise subject to not burp or belch or vomit
<u>04:05:45 PM</u>		15 minute observation period - Monitored Defendant the whole time.
<u>04:06:19 PM</u>		Read him the ALS form to him

<u>04:07:06 PM</u>		During the 15 minute evaluation I am talking with them - explains -
<u>04:07:46 PM</u>		He submitted to a breath test - explains the Intoxilizer - The machine was functioning properly -
<u>04:10:53 PM</u>		Explains what I tell the Defendant about how to proceed with test -
<u>04:11:47 PM</u>		He did perform that test - He never indicated a refusal to doing tests - He completed the test - we got a print out .17 & .18 - Explained readings and 1st time DUI being charged
<u>04:12:47 PM</u>		At first he questioned at me being in front of his house - After that he was pretty cooperative both at the scene and at the jail - I have a body camera - explains - I recorded my contact at the residence and the contact at the Kootenai County jail -
<u>04:14:10 PM</u>		I also have a video - in-car dash video - explains where attached in car -
<u>04:14:55 PM</u>		My video was on that night and caught the alleged violation on that that night
<u>04:15:17 PM</u>	PA - David Judd	Nothing further
<u>04:15:22 PM</u>	DA - Jay Logsdon	Cross
<u>04:15:26 PM</u>	W#1 Mario Rios	I believe I transported him directly to the jail - I have a radio and cell-phone - I read the ALS form to defendant before requesting breath test
<u>04:17:03 PM</u>		Reviews document - Notice of Suspension or ALS form- recognize document - I would have last seen this that night I filled out the document
<u>04:17:38 PM</u>	DA - Jay Logsdon	Like Offer Exh A - as ALS Notice
<u>04:17:43 PM</u>	PA - David Judd	No Objection
<u>04:17:45 PM</u>	Judge Watson	Admits Exh #A
<u>04:18:11 PM</u>	DA - Jay Logsdon	Nothing further
<u>04:18:16 PM</u>	PA - David Judd	Nothing further
<u>04:18:19 PM</u>	Judge Watson	Inquires of W#1
<u>04:18:24 PM</u>	W#1 Mario Rios	I was in a marked patrol car and in uniform



<u>04:18:51 PM</u>		Identifies Defendant in Courtroom -
<u>04:19:18 PM</u>		I did not activate my lights and pull him over - He was already in his driveway exiting his car- I didn't block him in- He saw me and he approached me -
<u>04:20:11 PM</u>		Didn't smell odor of alcoholic beverage at the first contact only when in custody - was windy out
<u>04:20:38 PM</u>	PA - David Judd	Nothing further
<u>04:20:40 PM</u>	DA - Jay Logsdon	Nothing further
<u>04:20:59 PM</u>	PA - David Judd	No further witnesses - We have videos - Like to publish In Car video only need to watch first couple minutes
<u>04:21:59 PM</u>	DA - Jay Logsdon	I would like the court to watch all three videos
<u>04:22:58 PM</u>	PA - David Judd	Rests
<u>04:23:05 PM</u>	DA - Jay Logsdon	No testimony - Like court to review videos and submit
<u>04:23:21 PM</u>		On the Motion to suppress stop that would work -
<u>04:23:33 PM</u>		Can do motion to suppress breath test at this time and Motion in Limine now
<u>04:24:01 PM</u>	DA - Jay Logsdon	Argues Motion to Suppress Breath Test -
<u>04:27:31 PM</u>	PA - David Judd	Argues Motion to Suppress Breath Test - feel the court needs to review the video pretty clear didn't review -
<u>04:29:01 PM</u>		This was clearly a consensual blow -
<u>04:30:14 PM</u>	Judge Watson	Reviews testimony of Officer Rios -
<u>04:40:03 PM</u>		Disagree with Mr Logsdon on requirement to have a warrant for a breath test -
<u>04:40:45 PM</u>		Deny Motion to Suppress Breath Test - I will view the videos and if I see something that would change my mind will let you know.
<u>04:41:29 PM</u>	DA - Jay Logsdon	Request clarification -
<u>04:41:52 PM</u>	Judge Watson	It appears to me Mr Riendeau consented to take the breath test -
<u>04:43:48 PM</u>		Regarding watching the videos - is there an issue in 15 minute wait period ?
<u>04:44:11 PM</u>	DA - Jay Logsdon	No

<u>04:44:13 PM</u>		Looking for view from car on the violation alledged - and also the interaction with the office and defendant
<u>04:44:40 PM</u>	Judge Watson	I am not finding the officer made a stop - explains -
<u>04:45:37 PM</u>	DA - Jay Logsdon	Motion in Limine
<u>04:45:42 PM</u>	PA - David Judd	Objection to proceeding to that based on notice requireement just got notice two days ago
<u>04:46:06 PM</u>	DA - Jay Logsdon	Explains Motion in Limine - on the reliability of the breath test machines
<u>04:47:48 PM</u>	Judge Watson	The motion was filed 5/6/13 and this is 5/10/13 - with authority -
<u>04:48:06 PM</u>	PA - David Judd	Not prepared to respond today - need some time
<u>04:48:33 PM</u>	Judge Watson	Can you have Mr Gowey submit authority or response by 5/16/13 @ 5pm Between now and the 20th I will review the videos and will address on 5/20/13
<u>04:49:21 PM</u>	PA - David Judd	Agree and we may file a supplemental memorandum on motions today
<u>04:49:43 PM</u>	DA - Jay Logsdon	IDAPA issue raised - explains
<u>04:50:53 PM</u>	END	

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<b>Description</b>	CR 2013-5363 Riendeau, Jesse Carl 20130524 Motion to Suppress-Limine Judge Watson Clerk - Nancy Albers		
<b>Date</b>	5/24/2013	<b>Location</b>	1K-COURTROOM3
<b>Time</b>	<b>Speaker</b>	<b>Note</b>	
<u>11:07:38 AM</u>	Judge Watson	Calls Case PA/DA present - DEFENDANT NOT PRESENT	
<u>11:13:26 AM</u>		Defendant not required to be here - Had full opportunity to review everything in this case - including the videos	
<u>11:14:00 AM</u>	DA - Jay Logsdon	Argues motion to Suppress regarding stop and extension of stop and the Motion in Limine -	
<u>11:16:43 AM</u>	PA - Roy Gowey	Argues Motions - Basis for stop -	
<u>11:19:45 AM</u>		and basis for continuance of stop - and investigation	
<u>11:20:07 AM</u>		Regarding Motion in Limine -	
<u>11:23:26 AM</u>	Judge Watson	Question for Mr Logsdon - In Motion in Limine filed 5/6/13 page 1 - Indicates Lifelock	
<u>11:24:09 AM</u>	DA - Jay Logsdon	That is a typo - should be the Intoxilizer 5000	
<u>11:24:26 AM</u>		Argues - Regarding argument of City Code -	
<u>11:27:19 AM</u>	Judge Watson	Comment - previous preliminary findings have not changed after viewing of video	
<u>11:27:42 AM</u>		Regarding the stop -	
<u>11:29:51 AM</u>		Review of testimony - We really don't have an actual stop in normal sense -	
<u>11:31:51 AM</u>		Finding under circumstance - Reasonable articulate suspensions to request tests- Will not suppress stop - or the results of Field Sobriety test	
<u>11:34:00 AM</u>		Probable cause for arrest - Video from jail - Can see officer checking defendant's mouth - Mr Riendeau was very cooperative	
<u>11:35:12 AM</u>		Finding officer's testimony of following 15 min observation time correct - Read the Defendant I.C. 18-8002 - Don't find any threats or coercion to take test - explains Implied consent statute	
<u>11:36:37 AM</u>		Motion in Limine regarding breath test Denied	
<u>11:37:08 AM</u>		Regarding the breath testing Intoxilizer 5000 -	
<u>11:38:35 AM</u>		On Plaintiff's Exh 3 - Appeared the Defendant had some	

		issues following instructions -
<u>11:39:37 AM</u>		Plaintiff's Exh 2 - Could see the vehicle go buy in bike lane and you can hear comments by the Defendant - Clear problem with balance
<u>11:40:25 AM</u>		Plaintiff's Exh 3 - comments -
<u>11:40:52 AM</u>	Judge Watson	Regarding the Motion regarding the Manuel and Operating Procedure - Reviews testimony -
<u>11:41:57 AM</u>		Difference in the word should and must -
<u>11:42:10 AM</u>		15 min time is a should - regarding musts regarding the testing
<u>11:43:05 AM</u>		Standard Operating Procedures assure reliability -
<u>11:43:55 AM</u>		finding officer followed all the requirements - and SOP is valid
<u>11:44:41 AM</u>		Deny to Motion to Suppress Breath test results -
<u>11:45:02 AM</u>	Judge Watson	PA prepare Order
<u>11:45:31 AM</u>		Set for PTC 6/21/13 @ 1:00 p.m. Jury Trial 7/1/13 @ 8:30 a.m.
<u>11:45:54 AM</u>	DA - Jay Logsdon	When did the Court feel the defendant was no longer free to leave
<u>11:46:17 AM</u>	Judge Watson	Believe that occurred when the officer begin the Field Sobriety tests
<u>11:46:52 AM</u>	PA - Roy Govey	Comments
<u>11:47:09 AM</u>	END	

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**ORIGINAL**

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Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 8759

STATE OF IDAHO } SS  
COUNTY OF KOOTENAI }  
FILED:

2013 MAY 28 AM 9: 53

CLERK DISTRICT COURT

DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE**

**STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

**STATE OF IDAHO,**

Plaintiff,

V.

**JESSE CARL RIENDEAU,**

Defendant.

**CASE NUMBER CR-13-0005363**

**Misd**

**MOTION FOR EX PARTE JUDGE AND  
HEARING ON EX PARTE  
APPLICATIONS**

The above named defendant, by and through defendant's attorney, Jay Logsdon, Deputy Public Defender, hereby moves this Court to appoint a magistrate judge to hear Defendant's ex parte applications for funds to assist in the preparation of the defense. That hearing must be *ex parte* based on the holding of the Supreme Court of the United States in *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985). This motion is pursuant to I.C. § 19-852(a)(2), Article I §§ 1, 13, 18 of the Idaho Constitution, and the Fourteenth and Sixth Amendments to the United States Constitution.

The Idaho Supreme Court and United States Supreme Court require the defendant to make a showing before assistance will be provided. The Court must determine whether the defendant can meet the standard set by the Idaho Court of Appeals in *State v. Martin*, 146 Idaho 257 (2008). That Court held that:

**MOTION FOR EX PARTE JUDGE AND  
HEARING ON EX PARTE APPLICATIONS**

**Page 1**

a defendant seeking assistance at state expense must make a threshold showing that the assistance has probable value to address what will be a significant factor at trial, such that the accuracy of the jury's determination would be called into question if the assistance were denied.

*Id.* at 363 citing *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985).

I.C. § 19-852(a) secures an impoverished defendant the right to services necessary to a fair trial. The statute reads:

19-852. Right to counsel of needy person—Representation at all stages of criminal and commitment proceedings—Payment

(a) A needy person who is being detained by a law enforcement officer, who is confined or is the subject of hospitalization proceedings pursuant to sections 18-212, 18-214, 66-322, 66-326, 66-329 or 66-409, Idaho Code, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled:

...

(2) to be provided with the necessary services and facilities of representation (including investigation and other preparation). The attorney, services, and facilities and the court costs shall be provided at public expense to the extent that the person is, at the time the court determines need, unable to provide for their payment.

...

Thus, the cost of an expert witness is to be covered by the public under I.C. § 19-852.

Even more specifically, the “public” is in fact the county where the case takes place. *See* I.C. §§ 19-859, 19-863. I.C. § 19-862 requires the county to appropriate enough money “to administer the program of representation that it has elected under section 19-859.” I.C. § 19-863, however, states:

Subject to section 19-861, any direct expense, including the cost of a transcript that is necessarily incurred in representing a needy person under this act, is a county charge against the county on behalf of which the service is performed.

I.C. § 19-861 states:

(a) If an office of public defender has been established, the public defender may employ, in the manner and at the compensation prescribed by the board of county commissioners, as many assistant public defenders, clerks, investigators, stenographers, and other persons as the board considers necessary for carrying out his responsibilities under this act. A person employed under this section serves at the pleasure of the public defender.

(b) If an office of public defender has been established, the board of county commissioners shall:

(1) provide appropriate facilities (including office space, furniture, equipment, books, postage, supplies, and interviewing facilities in the jail) necessary for carrying out the public defender's responsibilities under this act; or

(2) grant the public defender an allowance in place of those facilities.

(c) A defending attorney is entitled to use the same state facilities for the evaluation of evidence as are available to the county prosecutor. If he considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county board of commissioners.

Therefore, it is clear that I.C. § 19-863 directs the county to pay for the direct costs of the defense of a needy defendant where sufficient cause is shown.

In order for this Court to remain neutral, a separate judge must decide whether to grant this motion. At the hearing, the defendant will likely need to reveal confidential information, such as trial strategy and aggravating or mitigating factors. To hold the hearing without an *ex parte* judge would deny fairness to both parties.

Counsel requests that this motion be set for a hearing in order to present oral argument, evidence and/or testimony in support thereof. Requested time is 15 minutes.

DATED this 24 day of May, 2013.

THE LAW OFFICE OF THE PUBLIC  
DEFENDER OF KOOTENAI COUNTY

BY: Jay Logsdon  
JAY LOGSDON  
DEPUTY PUBLIC DEFENDER

**CERTIFICATE OF DELIVERY**

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same as indicated below on the 08 day of May, 2013, addressed to:

Coeur d'Alene Prosecutor FAX 769-2326

✓ Via Fax

\_\_\_\_\_ Interoffice Mail

Christine Stange



COEUR D'ALENE CITY ATTORNEY'S OFFICE  
710 E. MULLAN AVENUE  
COEUR D'ALENE, IDAHO 83814  
TELEPHONE: (208) 769-2323  
FAX: (208) 769-2326

STATE OF IDAHO } ss  
COUNTY OF KOOTENAI  
FILED: 6-20-13  
AT 12:00 O'CLOCK PM  
CLERK, DISTRICT COURT  
Rosey K. Allen  
DEPUTY

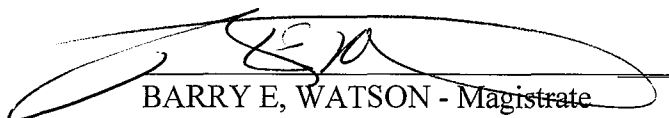
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,	)	
	)	CASE NO. CRM-13-005363
Plaintiff,	)	
	)	
vs.	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO SUPPRESS FOR ILLEGAL
JESSE CARL RIENDEAU,	)	STOP AND DETENTION, MOTION TO
	)	SUPPRESS BREATH RESULTS AS
Defendant.	)	NONCONSENSUAL, AND MOTION IN
	)	LIMINE FOR INADEQUATE SOPs
_____	)	

The Court heard argument on Defendant's motions in the above matter on May 24, 2013. The Defendant was represented by his attorney, JAY LOGSDON; the state was represented by ROY GOWEY, Deputy Coeur d'Alene City Attorney. Earlier the Court had heard argument on the various motions on May 10, 2013 and on May 20, 2013 and had viewed the videos submitted and reviewed the Standard Operating Procedures (SOPs) and training manuals provided. After the legal arguments of counsel the Court announced its findings and conclusions on the record. Based on the announced findings and conclusions:

IT IS HEREBY ORDERED that all of Defendant's motions are DENIED

Entered this 20 day of JUNE, 2013.

  
BARRY E. WATSON - Magistrate

Copies to:

Def. _____	Def. Att _____	CDA Pros. _____
CDA PD _____	Jail, CIB _____	Sup. Ct. _____
Aud. _____	Bonding Co. _____	Other _____
Date _____	Dep. Clerk _____	

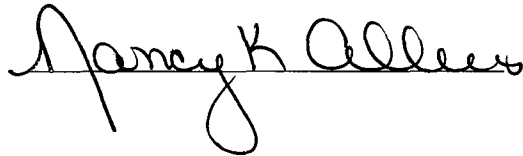

### CERTIFICATE OF MAILING

I herby certify that I mailed/delivered a true and correct copy of the forgoing Order Denying Defendant's Motions, by regular U.S. Mail, postage prepaid, by facsimile, or by Interoffice mail at the Kootenai County Courthouse to:

JAY LOGSDON  
Attorney for Defendant  
FAX: (208)446-1701

City of Coeur d'Alene Attorney Office  
FAX: 769-2326

DATED this 20 day of June, 2013.

<b>Description</b>	CR 2013-5363 Riendeau, Jesse 20130621 Pretrial Conference Judge Peterson Clerk Cassie Poole		
<b>Date</b>	6/21/2013	<b>Location</b>	1K-COURTROOM7
<b>Time</b>	<b>Speaker</b>	<b>Note</b>	
<u>01:23:36 PM</u>	Judge Peterson	Defendant present not in custody with attorney Mr. Logsdon Mr. Govey for the city	
<u>01:24:45 PM</u>	Logsdon, Jay	State agreed if enter conditional plea recommend 180 days jail 176 suspended 800 fine 90 days jail Evaluation and victims panel ask set for sentencing withdraw motions	
<u>01:25:42 PM</u>	Judge Peterson	Think as part as conditional plea need to be specific about motions	
<u>01:26:05 PM</u>	Govey, Roy	No preference to entering plea	
<u>01:26:26 PM</u>	Logsdon, Jay	Agree to vacate trial and set disposition	
<u>01:26:33 PM</u>	Riendeau, Jesse	Understand what lawyers talking about	
<u>01:26:39 PM</u>	Judge Peterson	Sounds like prior motions were denied and attorney wanted to appeal those. I am being told you will enter conditional plea. Your pending trial date will be vacated and will set for disposition on a later day	
<u>01:27:20 PM</u>	Riendeau, Jesse	That is what I would like to do.	
<u>01:27:28 PM</u>	Judge Peterson	Vacate trial order set for disposition plea will need to be entered. Please prepare written conditional plea outlining conditions.	
<u>01:27:51 PM</u>	End		

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**ORIGINAL**

STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
FILED:

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Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 8759

2013 AUG -1 PM 2:36

CLERK DISTRICT COURT

DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

**STATE OF IDAHO,**

Plaintiff,

V.

**JESSE CARL RIENDEAU,**

Defendant.

**CASE NUMBER CR-13-0005363**  
**Misd**

**MOTION TO STAY SENTENCE**

COMES NOW, the above named defendant, by and through his attorney, Jay Logsdon, Deputy Public Defender, and hereby moves this honorable Court for an order staying the sentence to be imposed in this matter pending appeal.

This motion is made pursuant to I.C.R. 54.5. It is made on the grounds that the defense counsel believes that the defendant will be successful on appeal from the orders in this matter denying his motions to suppress the evidence against him and exclude the results of the breath test.

Counsel requests that this motion be set for hearing in order to present oral argument, evidence and/or testimony in support thereof. Requested time is 10 minutes.

**MOTION TO STAY SENTENCE**

**Page 1**

DATED this 1 day of August, 2013.

THE LAW OFFICE OF THE PUBLIC  
DEFENDER OF KOOTENAI COUNTY

BY: Jay Logsdon  
JAY LOGSDON  
DEPUTY PUBLIC DEFENDER

**CERTIFICATE OF DELIVERY**

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same as indicated below on the 1 day of August, 2013, addressed to:

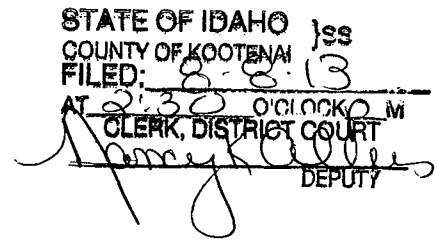
Coeur d'Alene City Prosecutor FAX 769-2326

X Via Fax

\_\_\_\_\_ Interoffice Mail

Alvin Strange

Jay Logsdon, Deputy Public Defender  
The Law Office of the Public Defender Kootenai County  
PO Box 9000  
Coeur d'Alene, Idaho 83816  
Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 8759



**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

**STATE OF IDAHO,**

Plaintiff,

V.

**JESSE CARL RIENDEAU,**

Defendant.

**CASE NUMBER CR-13-0005363**  
**Misd**

**RULE 11 CONDITIONAL PLEA**

In accordance with Rule 11(a)(2) of the Idaho Criminal Rules, the above named Defendant, by and through his attorney, Jay Logsdon, Deputy Public Defender, and the State of Idaho, through Deputy Prosecuting Attorney, Roy Gowey, agree that the Defendant (1) may enter a conditional plea of guilty to the charge in this case, (2) reserves the right to appeal the May 10, 2013, May 20, 2013, and May 24, 2013 Orders, and (3) shall be allowed to withdraw his plea of guilty if he prevails on appeal.

DATED this 8 day of August, 2013.

THE LAW OFFICE OF THE PUBLIC  
DEFENDER OF KOOTENAI COUNTY

BY:

  
JAY LOGSDON  
DEPUTY PUBLIC DEFENDER

**CONDITIONAL PLEA**


**Page 1**

DATED this 8<sup>th</sup> day of August, 2013.

  
JESSE RIENDEAU  
DEFENDANT

DATED this 8<sup>th</sup> day of August, 2013.

OFFICE OF THE KOOTENAI COUTY  
PROSECUTING ATTORNEY

  
ROY GOWEY  
DEPUTY PROSECUTING ATTORNEY

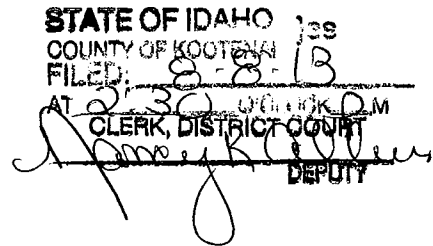
### **CERTIFICATE OF DELIVERY**

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the \_\_\_\_\_ day of August, 2013, addressed to:

Coeur d'Alene Prosecutor FAX 769-2326 Prosecutor

\_\_\_\_\_

Jay Logsdon, Deputy Public Defender  
The Law Office of the Public Defender Kootenai County  
PO Box 9000  
Coeur d'Alene, ID 83814  
Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 8759



**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

**STATE OF IDAHO,**

Plaintiff,

V.

**JESSE CARL RIENDEAU,**

Defendant.

**CASE NUMBER CR-13-0005363**  
**Misd**

**ORDER**

Based upon the Stipulation of the parties, and the approval of the Court,

IT IS HEREBY ORDERED that the Defendant be allowed to enter a Conditional Plea in  
the above-referenced matter.

DATED this 8 day of August, 2013.

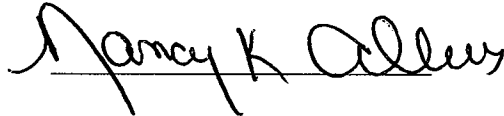


BARRY WATSON  
MAGISTRATE

**CLERK'S CERTIFICATE**

I hereby certify that a true and correct copy of the foregoing was personally served by placing a  
copy of the same by facsimile on the 8 day of August, 2013 addressed to:

Kootenai County Public Defender 446-1701  
Coeur d'Alene Prosecutor FAX 769-2326 Prosecutor





<b>Description</b>	CR 2013-5363 Riendeau, Jesse Carl 20130808 Sentencing Judge Watson Clerk - Nancy Albers		
<b>Date</b>	8/8/2013	<b>Location</b>	1K-COURTROOM4
<b>Time</b>	<b>Speaker</b>	<b>Note</b>	
<u>02:19:50 PM</u>	Judge Watson	Calls Case PA (Anne Eckhart) DA (Paul Szott) Defendant present	
<u>02:20:09 PM</u>			
<u>02:20:17 PM</u>	DA - Paul Szott	I have here of behalf of Mr Logsdon - Rule 11 Conditional Plea to Charge	
<u>02:20:41 PM</u>	PA - Anne Eckhart	Agree	
<u>02:21:40 PM</u>		Recomendations for plea	
<u>02:22:30 PM</u>	Judge Watson	Inquires of Defendant regarding rights and penalties	
<u>02:22:32 PM</u>	Jesse Riendeau - Defendant	Understands rights and penalties	
<u>02:22:33 PM</u>	Judge Watson	Reads charge -	
<u>02:23:02 PM</u>	Jesse Riendeau - Defendant	Understands Charge - Enters guilty plea	
<u>02:23:24 PM</u>	Judge Watson	Accepts Plea -	
<u>02:23:43 PM</u>	PA - Anne Eckhart	Comments and Recomendations	
<u>02:24:33 PM</u>	DA - Paul Szott	Comments and Recomendations - Request Stay of Sentencing pending appeal on any further jail	
<u>02:24:54 PM</u>		Defendant has gotten a Evaluation and already in treatment -	
<u>02:26:02 PM</u>	Jesse Riendeau - Defendant	Nothing further	
<u>02:26:19 PM</u>	Judge Watson	Fine & cc \$1000 to pay in 30 days or as arranged	
<u>02:26:52 PM</u>		I don't stay fines and costs if appeal sucessful those can be reimbursed - Don't stay license susp since not requested and don't stay Probation explains	
<u>02:27:32 PM</u>		DA Prepare Order on Stay on the Labor Program or Jail only	
<u>02:27:46 PM</u>		Jail 180 days - Susp 176 days Credit 1 day - Allow 16 hrs SCLP - Sign up 7 days	
<u>02:28:07 PM</u>		Complete by 10/8/13 or report to jail 10/10/13 @ 6pm	

<u>02:28:22 PM</u>		License Susp 90 days Commencing 4/20/13 - Concurrent with ALS
<u>02:28:41 PM</u>		Probation 2 yrs - Conditions
<u>02:28:49 PM</u>		Complete ADIS and Victim's Panel and file proof within 90 days
<u>02:29:44 PM</u>		
<u>02:29:59 PM</u>	Jesse Riendeau - Defendant	Understands and accepts
<u>02:30:24 PM</u>		Evaluation indicates 16 hrs
<u>02:30:32 PM</u>	Judge Watson	That is correct so change requirement for ADIS to 16 hrs of Education and file proof
<u>02:31:24 PM</u>	END	

Produced by FTR Gold™  
[www.fortherecord.com](http://www.fortherecord.com)

FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO, COUNTY OF KOOTENAI  
324 W. GARDEN AVENUE, P.O. BOX 9000, COEUR D'ALENE, IDAHO 83816-9000

STATE OF IDAHO V  
JESSE CARL RIENDEAU  
1138 N 10TH ST  
COEUR D'ALENE, ID 83814  
DL# [REDACTED] ID  
DOB [REDACTED] AGENCY: COEUR D'ALENE PD  
CASE # CR-2013-0005363 CITATION # C2501703  
CHARGE: 118-8004 M DRIVING UNDER THE INFLUENCE  
AMENDED:

JUDGMENT  
FILED 8-8-13 AT 2:30p.m.  
CLERK OF THE DISTRICT COURT  
BY: [Signature] DEPUTY  
BOND:

The defendant having been fully advised of his/her statutory and constitutional rights including the right to be represented by counsel, and

- |   |  |
|---|--|
| <input type="checkbox"/> Been advised of right to court appointed counsel if indigent | <input type="checkbox"/> Judgment—Not Guilty                               |
| <input type="checkbox"/> Defendant waived right to counsel                            | <input type="checkbox"/> Judgment on Trial—Guilty                          |
| <input checked="" type="checkbox"/> Defendant represented by counsel                  | <input type="checkbox"/> Judgment for Defendant / Infraction               |
| <input checked="" type="checkbox"/> Judgment, Plea of Guilty / Rights Waived          | <input type="checkbox"/> Judgment for State / Infraction                   |
| <input type="checkbox"/> Withheld Judgment <input type="checkbox"/> Accepted          | <input type="checkbox"/> Bond Forfeited / Conviction Entered - Case Closed |
| <input type="checkbox"/> Dismissed  | <input type="checkbox"/> Bond Forfeited / Dismissed                        |

MONIES ORDERED PAID: A \$2.00 handling fee will be imposed on each installment.

- ☒ Fine / Penalty \$ 1,000.00 which includes costs, and probation fee if applicable. Suspended \$ \_\_\_\_\_  
☒ Pay within 30 days of today, or enroll in time payment program BEFORE due date.  
☐ Community Service \_\_\_\_\_ hours by \_\_\_\_\_ Setup Fee \$ \_\_\_\_\_ Insurance Fee \$ \_\_\_\_\_  
**Must sign up within 7 days.**  
☐ Reimburse \_\_\_\_\_  
☐ Restitution \_\_\_\_\_  
☒ Bond Exonerated, provided that any deposit shall first be applied pursuant to Idaho Code 19-2923 in satisfaction of outstanding fines, fees and costs with any remainder to be refunded to the posting party. ☐ Authorization from defendant to pay restitution and/or infractions from bond.  
☐ No Contact Order, as condition of bond, terminated.

INCARCERATION ORDERED:

- ☒ Jail 180 days, Suspended 176 days, Credit 1 days, Discretionary Jail \_\_\_\_\_ days are imposed & will be scheduled by the Adult Misdemeanor Probation Office, or Court, for violations of the terms below or on the attached addendum.  
☒ Report to Jail 10-10-13 6PM Release 10-13-13 6PM ☐ Work Release Authorization (if you qualify).  
☒ Sheriff's Community Labor Program in lieu of Jail (if you qualify) 16 hours by 10-8-13 **Must sign up within 7 days.**  
Follow the Labor Program schedule and policies.  
☐

DRIVING PRIVILEGES SUSPENDED 90 days commencing 4-20-13 CC WJ NLS  
REINSTATEMENT OF DRIVING PRIVILEGES MUST BE ACCOMPLISHED before you can drive. Apply to DRIVER'S SERVICES, P.O. Box 7129, Boise, ID 83707-1129.

- ☐ Temporary Driving Privileges Granted commencing N/A  
**To, from and for work purposes / required medical care / court ordered alcohol program / community service. Must carry proof of work schedule and liability insurance at all times. Not valid if insurance expires.**

PROBATION ORDERED FOR TWO YEAR(S) ON THE FOLLOWING CONDITIONS:

☐ Supervised - See Addendum

- ☒ Violate no federal, state or local laws more serious than an infraction. ☒ Commit no similar offenses.  
☒ Maintain liability insurance on any vehicle that you drive.  
☒ Do not operate a motor vehicle with any alcohol or controlled substances in your bloodstream.  
☒ You must submit to any blood alcohol concentration test requested of you, with reasonable cause, by a peace officer.  
☒ Obtain a Substance Abuse/Battery Evaluation, and file proof of evaluation, within \_\_\_\_\_ days.  
☒ Enroll in & complete ADDS + V.P. program. File proof of completion within 90 days.  
☒ Notify the court, in writing, of any address change within 10 days. Agrees to accept future service by mail at the last known address.  
☐ Interlock ignition device required on vehicle for \_\_\_\_\_ year(s). To be installed per attached addendum.  
☐ Other \_\_\_\_\_

THE SUSPENDED PENALTIES ARE SUBJECT TO YOUR COMPLIANCE WITH ALL TERMS HEREIN

THE DEFENDANT HAS THE RIGHT TO APPEAL

THIS JUDGMENT WITHIN 42 DAYS

Copies To: \_\_\_\_\_  
Def. \_\_\_\_\_ Def. Atty. \_\_\_\_\_ [ ] Pros. \_\_\_\_\_ [ ] Other \_\_\_\_\_ [ ] Comm. Serv. \_\_\_\_\_ Jail (fax 446-1407)  
[ ] KCSO RECORDS (fax 446-1807) (NCO) [ ] Agency fax \_\_\_\_\_ 419 (NCO) [ ] Dr. Serv. fax 208-334-8739 [ ] Auditor fax 446-16612 (AMP) (fax 446-1990)  
Date \_\_\_\_\_ Deputy Clerk \_\_\_\_\_

**ORIGINAL**

Jay Logsdon, Deputy Public Defender  
The Law Office of the Public Defender Kootenai County  
PO Box 9000  
Coeur d'Alene, Idaho 83816  
Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 8759

STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
FILED:

2013 AUG 16 PM 3:01

CLERK DISTRICT COURT

DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

**STATE OF IDAHO,**

Plaintiff/  
Respondent,

V.

**JESSE CARL RIENDEAU,**

Defendant/  
Appellant.

**CASE NUMBER CR-13-0005363**  
**Misd**

**NOTICE OF APPEAL**

TO: THE ABOVE NAMED RESPONDENT, STATE OF IDAHO, AND THE CLERK OF  
THE ABOVE ENTITLED COURT:

1. The above named Appellant hereby appeals against the above named Respondent, the State of Idaho, to the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, the Judgment and Sentence entered in the Magistrate's Division of said District Court in the above entitled matter on or about August 8, 2013, the Honorable Barry Watson, Magistrate, presiding. Said Judgment and Sentence are based on the Conditional Guilty Plea entered pursuant to I.C.R. 11(a)(2) on June 21, 2013.

2. That the party has a right to appeal to the Kootenai County District Court, and the judgment described in paragraph one above is an appealable order under and pursuant to Idaho Criminal Rule 54.1(a).

3. That this appeal is taken upon matters of law and fact.

4. A preliminary statement of the issues on appeal, which the appellant then intends to assert in the appeal, provided any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal, is/are:

- (a) Did the Magistrate Court err in denying the defendant's Motion to Suppress the stop?
- (b) Did the Magistrate Court err in denying the defendant's Motion in Limine?
- (c) Did the Magistrate Court err in denying the defendant's Motion to Suppress the breath test?

5. No portion of the record is sealed at this time.

6. **Reporter's Transcript.** Pursuant to I.C.R. 54.6(a) and I.A.R. 25(a) and (c)(5) as they apply to this appeal under I.C.R. 54.7(d), Appellant requests the preparation of the entire reporter's transcript of the motions hearings on May 10, 2013, May 20, 2013 and May 24, 2013. The proceedings were digitally recorded by the Clerk, and the recording is in the possession of the Clerk.

7. **Clerk's Record.** The appellant requests the standard clerk's record pursuant to I.C.R. 54.8. The appellant requests the following documents to be included in the clerk's record pursuant to I.C.R. 54.18 and I.A.R. 28(c), in addition to those automatically included under I.C.R. 54.8:

- (a) Any exhibits.
- (b) A copy of the defendant's Supplemental Material for Motion in Limine and Motion for Judicial Notice and attachments including copies of the standard operating procedures and manual.

7. I certify:

(a) A copy of this Notice of Appeal has been served upon the court reporter (transcriptionist).

(b) The Appellant is exempt from paying the estimated transcript fee because the Appellant is an indigent who is represented by the Office of the Kootenai County Public Defender.

(c) The Appellant is exempt from paying the filing fee because the Appellant is an indigent who is represented by the Office of the Kootenai County Public Defender.

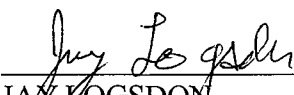
(d) The Appellant is exempt from paying the estimated fee for the preparation of the record because the Appellant is an indigent who is represented by the Office of the Kootenai County Public Defender.

(e) Service has been made upon all parties required to be served pursuant to Idaho Criminal Rule 54.4, to wit: the Coeur d'Alene Deputy City Attorney.

DATED this 14 day of August, 2013.

THE LAW OFFICE OF THE PUBLIC  
DEFENDER OF KOOTENAI COUNTY

BY:

  
JAY LOGSDON  
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF SERVICE

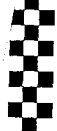
I HEREBY CERTIFY that I have this 16 day of August, 2013, served a true and correct copy of the attached NOTICE OF APPEAL via interoffice mail or as otherwise indicated upon the parties as follows:

Coeur d'Alene City Prosecutor via

X Fax 208-769-2326

Kootenai County Transcript Department FAX

A handwritten signature in cursive script, reading "Christine Strange", written over a horizontal line.



Jay Logsdon, Deputy Public Defender  
 The Law Office of the Public Defender of Kootenai County  
 PO Box 9000  
 Coeur d'Alene, Idaho 83816  
 Phone: (208) 446-1700; Fax: (208) 446-1701  
 Bar Number: 8759

STATE OF IDAHO  
 COUNTY OF KOOTENAI  
 FILED: 8-22-13  
 AT 11:15 O'CLOCK AM  
 CLERK, DISTRICT COURT  
 DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,	)	
	)	CASE NUMBER CR-13-0005363
Plaintiff,	)	
	)	
V.	)	
	)	ORDER PARTIALLY STAYING
JESSE CARL RIENDEAU,	)	IMPOSITION OF SENTENCE
	)	
Defendant.	)	
	)	

The Court having before it the Motion to Stay Sentence, having heard argument on August 8, 2013, and good cause appearing, now, therefore

IT IS HEREBY ORDERED that the incarceration ordered in the judgment, including the requirement of participating in the Sheriff's Community Labor Program, entered on August 8, 2013, is stayed pending the resolution of the defendant's appeal in the District Court of Kootenai County.

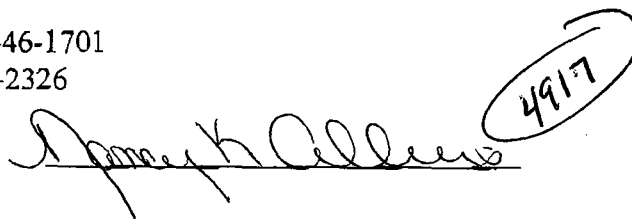
ORDERED this 22 day of August, 2013.

  
 BARRY WATSON  
 MAGISTRATE JUDGE

**CLERK'S CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same as indicated below on the 22 day of August, 2013, addressed to:

Kootenai County Public Defender FAX 446-1701  
 Coeur d'Alene City Prosecutor FAX 769-2326  
 cc KCSO - 446-1407  
 SCLP 446-1371

 4917

**ORDER PARTIALLY STAYING IMPOSITION OF SENTENCE**

Page 1



4419

STATE OF IDAHO  
COUNTY OF KOOTENAI } SS  
FILED

Jay Logsdon, Deputy Public Defender  
The Law Office of the Public Defender Kootenai County  
PO Box 9000  
Coeur d'Alene, Idaho 83816  
Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 8759

2013 OCT 15 AM 10:26

CLERK DISTRICT COURT

*Sabana Thomas*  
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,	)	
	)	
Plaintiff/	)	CASE NUMBER CR-13-0005363
Respondent,	)	Misd
	)	
V.	)	BRIEF SUPPORTING APPEAL
	)	
JESSE CARL RIENDEAU,	)	
	)	
	)	
Defendant/	)	
Appellant.	)	
_____	)	

Appeal from the Magistrate Court of the First Judicial District for Kootenai County.

Honorable Barry Watson presiding.

**ATTORNEY FOR THE PLAINTIFF:**

ROY GOWEY  
DEPUTY PROSECUTING ATTORNEY  
710 E. MULLAN AVE.  
COEUR D' ALENE, ID 83814

**ATTORNEY FOR DEFENDANT:**

JAY LOGSDON  
DEPUTY PUBLIC DEFENDER  
400 NORTHWEST BLVD.  
COEUR D' ALENE, ID 83814

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#### CONSTITUTIONAL PROVISIONS

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### STATEMENT OF THE CASE

#### A. Nature of the Case

This is an appeal from a conditional plea under I.C.R. 11. The state alleged that the defendant had driven under the influence. The defendant moved to suppress the seizure of his person by the officer for lack of reasonable, articulable suspicion that he had or was breaking the law. The defendant further moved to suppress the results of a breath test on the basis of a violation of the constitution's prohibition on warrantless searches, but the Magistrate Court found that the defendant's consent, provided after being told the consequences of a refusal, was not invalid. Finally, the defendant then moved for the breath test result to be excluded at trial because the state was in violation of I.C. § 18-8004(4). At a later hearing, the Court found that the Standard Operating Procedures were reliable. The Court also found there was nothing wrong with the way the standards were adopted. The Court also found that the defendant was only stopped after the officer had reasonable and articulable suspicion to believe he had driven under the influence.

The defendant then entered a conditional plea of guilty while reserving his right to appeal the Court's rulings and the Court found his guilty. The defendant now appeals the judgment.

B. Course of Proceedings & Statement of Facts

Coeur d'Alene Police Officer Rios stopped the defendant Jesse Riendeau as he walked from his driveway to his front door on May 10, 2013. Tr. p. 5, L. 20-25, p. 32, L. 1-4. Later that evening the officer arrested the defendant and cited him with driving under the influence. Tr. p. 23, L. 7-10.

On May 10, 2013, the defendant appeared before the Magistrate Court and moved to suppress the officer's stop of his person, the results of a breath test, and to exclude the results of the breath test on the grounds that the foundation for their admission was in violation of I.C. §§ 18-8004(4) and 18-8002A. Tr. p. 1, L. 1-20. The Court heard Officer Rios testify. Tr. p. 5. The parties stipulated to three videos which were entered as state's exhibits 1, 2, and 3. The defendant entered the ALS form the officer read to the defendant as defendant's exhibit A. Exhibit 3 shows at the 0:00 minute mark the officer's original contact with the defendant, asking him in an accusatory tone if he knows why he is being contacted, whether he's had anything to drink, and then requests the defendant's license, which he is promptly given, as the officer continues to talk to the defendant about driving in the bike lane.

The Court heard argument as to whether a warrant was required to do a breath test and whether the consent provided after hearing the ALS form was valid. The Court found:

THE COURT: ..I'm not reading the McNeeley decision as being expanded to um, a requirement that a person um, you know, uh , if he's refusing a breath test that they would – you know, I don't think the officer can force the person to blow into the machine. Um,



and if they want a blood test or blood, draw, then they're gonna have to get a search warrant if the person doesn't consent to that, and I'm not sure that the implied consent law is gonna be sufficient to provide that.

Now, what I'm getting here is uh, uh, from -- if I'm understanding Mr. Logsdon correctly, he's feeling that the reading of the notice of the advisory form, Defendant's A, is kind of almost forcing or coercing a person to take a breath test. And I'm disagreeing with that. I don't think that's what the law says and I'm not sayin' that's what the facts say here. It appears to me that Mr. Riendeau has a decision to make. He can blow in the device or not. IT's completely up to him. But if he doesn't, then there are going to be some potential penalties. He does have the ability to request a hearing and show cause why he didn't take the test.

Tr. p. 52, L. 12-23.

On May 20, 2013, the Court heard testimony from Jeremy Johnston of the Idaho State Lab. Tr. p. 63.

On May 24, 2013, the Court heard argument on the Motion in Limine and the Motion to Suppress the stop. Tr. p. 85. As to the stop, the Court found:

THE COURT: While [Officer Rios] was on Harrison Avenue he saw a vehicle approaching him that was all the way on the right-hand side of the, you know, paved portion of the road there over into the bike lane.

...

[A]s Officer Rios testified, he saw the driver stepping out of the car. He approached and um, then – then Mr. Riendeau um, was kind of walking towards him, looked like he had some sort of bag of food or something with him. The officer told Mr. Riendeau why he was contacting him, told him about the uh, perceived violation on uh, Harrison, and noticed that Mr. Riendeau's reactions were somewhat slow, his speech was somewhat slurred and he had some clumsy actions, and he asked Mr. Riendeau if he had drank any alcohol and Mr. Riendeau said no. He asked if he had ingested any drugs or prescription or whatever and he said no.

Now, the officer also indicated at some point that it was kind of windy out, and you can actually hear the wind from time to time in the video. Initially he didn't – the officer didn't smell any alcohol on Mr. Riendeau at first due to the wind, but then when – when he got a little bit closer to him he – then he was able to smell some – some alcohol on him.

...

I do find under the circumstances of this case here that the officer did have a reasonable articulable suspicion to believe that Mr. Riendeau was operating the vehicle contrary to law and might – might be impaired or have some – some issue there that would justify the further investigation and the further contact. So I would not be suppressing the evidence based on any illegal uh, stop or prolonged contact.

Tr. p. 93, L. 20-23, p. 94, L. 18-25, p. 95, L. 1-14, 22-25, p. 96, L. 1-4. Upon a request for clarification from the defendant, the Court added:

THE COURT: It – it didn't appear to me that he was um, free to leave at the – at the point where the officer was – was havin' him take the uh – the – the – you know, the HGN and those kinds of things. And um, but I did feel that he had a reasonable, articulable suspicion um, at – at that point. Not probable cause, but he had a reasonable, articulable suspicion to continue the contact. But once he starts, you know, doin' the HGN and the walk and turn and those kind of things, I don't – I didn't find that he was really free to leave at that point.

Tr. p. 104, L. 8-18.

The Court further found that the standard operating procedures adopted by the Idaho State Police were "legitimate and make sure that the device is working properly and assure us the scientific validity of the instrument." Tr. p. 103, L. 2-5.

The defendant entered a conditional plea under I.C.R. 11. The defendant timely filed a notice of appeal under I.C.R. 54.1(a), *et seq.* from the judgment of the Court.

### ISSUES ON APPEAL

- I. Whether the defendant was free to leave when the officer followed him onto his property, called out to him, and then ignored his requests to let him go inside his home.
- II. Whether the officer had reasonable and articulable suspicion that the defendant had committed a crime when he stopped him on his lawn.
- III. Whether the Idaho State Police have properly promulgated rules for the administration of breath testing.
- IV. Whether the Idaho State Police have promulgated rules that ensure accuracy as required by I.C. § 18-8002A and I.C. § 18-8004(4).
- V. Whether the Administrative License Suspension advisory invalidates the defendant's consent to providing a breath sample under the Fourth Amendment of the United States Constitution and Article I § 17 of the Idaho Constitution.

### ARGUMENT

#### I.

##### A. Introduction

The Constitution denies the agents of the state the ability to seize citizens such that they are not free to walk away unless the officer has reasonable, articulable suspicion that the person in question has violated, is violating, or will violate the law. In this case, the Magistrate Court failed to recognize that the defendant was seized when the officer confronted him as he tried to

go inside his home. Further, the Court erroneously held that the officer had reasonable, articulable suspicion that the defendant had operated his vehicle in violation of the law.

B. Standard of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561 (Ct.App.1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106 (1995); *State v. Schevers*, 132 Idaho 786, 789 (Ct.App.1999).

C. Officer Rios illegally seized the defendant.

1. The Officer seized the defendant when he stopped him on his lawn and asked for his driver's license.

A seizure does not occur simply because a police officer approaches an individual on the street or other public place and asks a few questions. *Florida v. Bostick*, 501 U.S. 429 (1991); *Florida v. Royer*, 460 U.S. 491, 497 (1983). Even when officers have no basis for suspecting a particular individual, they may generally ask the individual questions and ask to examine identification. *Florida v. Rodriguez*, 469 U.S. 1 (1984); *INS v. Delgado*, 466 U.S. 210 (1984); *State v. Zapp*, 108 Idaho 723 (Ct.App.1985). So long as police do not convey a message that compliance with their requests is required, the encounter is deemed "consensual" and no reasonable suspicion is required. *See, e.g., Bostick, supra*. A seizure occurs—and the fourth

amendment is implicated—when an officer, by means of physical force or show of authority, has in some way restrained a citizen's liberty. *Bostick*, 501 U.S. at 434; *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

The critical inquiry is whether, taking into account all of the circumstances surrounding the encounter, “the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.” *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988). Further, a show of authority by an officer may require a showing of intimidation under some circumstances to qualify as a seizure. *See State v. Nelson*, 134 Idaho 675, 679 (Ct.App.2000) (holding that an officer’s gesture to driver to pull forward did not amount to a seizure); *see also Delgado*, 466 U.S. at 215. In *State v. Gutierrez*, 137 Idaho 647, 651 (Ct.App.2002) the Court found a seizure in part based on the officer’s “an accusatory tenor,” indicating it was not a consensual encounter.

In this case, the Court found that the defendant was not seized until the officer had him perform the field sobriety tests. However, at the beginning of the encounter, as can be seen on exhibit 3, the officer requested the defendant’s driver’s license. Taking a defendant’s driver’s license is a seizure. *See State v. Osborne*, 121 Idaho 520, 524 (Ct.App.1991). Even prior to the taking of the defendant’s license, it was clear from the officer’s tone that the defendant was not free to leave. Thus, the seizure occurred when the officer approached and began interrogating the defendant, or at least when the license was requested. Thus, the Magistrate Court’s finding was in error.

2. The officer acted on a mere hunch.

The Fourth Amendment to the United States Constitution and Article I § 17 of the Idaho Constitution guarantee every citizen the right to be free from unreasonable searches and seizures. *State v. Ramirez*, 145 Idaho 886, 888 (Ct.App. 2008); *State v. Salois*, 144 Idaho 344, 347 (Ct.App. 2007); *State v. Cerino*, 141 Idaho 736, 737 (Ct.App. 2005). Its purpose is “to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement agents, in order to ‘safeguard the privacy and security of individuals against arbitrary invasions.’” *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (quoting *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312 (1978)). When a warrantless search or seizure occurs, the government bears the burden of proving facts necessary to establish an exception to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *State v. Yeomans*, 144 Idaho 871, 873 (Ct.App.2007).

The Fourth Amendment is not violated when a police officer stops a person for investigative purposes if the officer has a reasonable and objective basis for suspecting that the person is involved in criminal activity. *Cerino*, 141 Idaho at 738. There must be specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Id.* The reasonableness of the officer's suspicion is evaluated based upon the totality of the circumstances at the time of the seizure. *Id.*

In *State v. Pick*, 124 Idaho 601, 605 (Ct. App. 1993) the Court held that slurred speech, glassy eyes, and admission to having imbibed an alcoholic beverage amounted to reasonable suspicion to

believe that the defendant was under the influence.

In the case before the Court, the lower Court found that at the time the officer seized the defendant he had seen him driving in the bike lane, followed him home, saw him step out of his car without stumbling, that the defendant's reactions were somewhat slow, his speech was somewhat slurred, his actions clumsy, and when asked the defendant stated he had not drank alcohol and was not on any drug or medication. Further, the officer could not smell alcohol on his person. These circumstances do not amount to reasonable suspicion to believe that the defendant was driving under the influence. This took place at approximately 1:00 AM. Simply being tired explained the "somewhat slurred" speech, clumsiness, and slow reactions. These three indicators alone cannot provide reasonable suspicion that one is under the influence.

Further, the officer claims that driving in a bike lane is against the law, but no such law was ever produced. The Idaho Code is silent on bike lanes. If there is an ordinance in the city of Coeur d'Alene upon which the state wished to rely, it failed to produce it as required by I.C. § 50-902. See *State v. Morgan*, 154 Idaho 109, 294 P.3d 1121, 1123-24 (2013); *State v. Doe*, 146 Idaho 386 (2008).

Therefore, the officer lacked reasonable, articulable suspicion that the defendant was engaged in criminal activity at the time he seized him. This Court should reverse the lower Court's order denying the defendant's motion to suppress evidence gathered but for the unlawful seizure of his person.



## II.

A. Introduction

The Magistrate Court erred in finding that the standard operating procedures adopted by the Idaho State Police were legitimate and that foundation could be laid for the admission of the breath test results.

B. Standard of Review

An appellate court exercises free review over questions of law. *Idaho v. Button*, 134 Idaho 814 (Ct.App.2000); *Powell v. Sellers*, 130 Idaho 122, 125 (Ct. App. 1997).

C. I.C. § 18-8004(4) requires the Idaho State Police to create a method for breath testing and without a method ensuring extremely reliable results the results are not admissible.

I.C. § 18-8004(4) states:

For purposes of this chapter, an evidentiary test for alcohol concentration shall be based upon a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, per two hundred ten (210) liters of breath or sixty-seven (67) milliliters of urine. Analysis of blood, urine or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho state police. Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

This statute must be strictly construed. As the Idaho Supreme Court in *Sivak* wrote

Ordinarily, we must construe a statute to give effect to all of its parts, if we can, and not construe it in a way that makes mere surplusage of one of its provisions. However, there is another principle of statutory construction that must be

considered here. Criminal statutes must be strictly construed. In *Thompson*, the Court said: "This principle extends not only to the elements of the substantive crime, but also to the sanctions potentially involved."

*State v. Sivak*, 119 Idaho 320, 324-25 (1990); citing *State v. Charboneau*, 116 Idaho 29, 153 (1989); *Hartley v. Miller-Stephan*, 107 Idaho 688, 690 (1984) (overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166 (1990)); *State v. Thompson*, 101 Idaho 430, 437 (1980); *State v. Alkire*, 79 Idaho 334, 338 (1957). Even if the result could be considered absurd, Idaho statutory construction no longer considers absurdity of the result a ground for voiding or changing a statute. *Verska v. Saint Alphonsus Regional Med. Center*, 151 Idaho 889, 895 (2011).

The strict construction rule is the rigid foundation of the rule of law. As the Supreme Court of the United States found:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled [sic] if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means \* \* \* would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

*Miranda v. Arizona*, 384 U.S. 436, 479-80 (1967) quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (dissenting opinion).

I.C. § 18-8004(4) unambiguously provides that the Idaho State Police shall create a method for the analysis of breath and that the results of breath testing and that method will be admissible despite any other law or court rule. The Idaho Court of Appeals has previously

considered what the result should be if the method is not faithfully complied with in *State v. Bell*,

115 Idaho 36 (Ct.App.1988) and its progeny. The Court in *Bell* held:

The pertinent language of I.C. § 18-8004(4), in effect at the time, stated:

Analysis of blood, urine or breath for the purpose of determining the alcohol concentration *shall* be performed by a laboratory operated by the Idaho department of health and welfare or by a laboratory approved by the Idaho department of health and welfare under the provisions of approval and certification standards to be set by that department,.... [Emphasis added.] <sup>FN3</sup>

FN3. “Analysis” as used in the quoted language of I.C. § 18-8004(4) refers only to that part of the testing procedure which must be performed in an approved laboratory. However, a critical part of the “analysis,” in a broader sense, is the first step of collecting a sample for testing. The collection of blood, urine or breath samples obviously will not generally be made at an approved laboratory. Nevertheless, because collection of samples is an essential part of analysis, Department of Health and Welfare regulations extend to that activity and, for the collection of blood, include descriptions of the proper collection instruments, antiseptics and chemical additives for preserving the sample in optimum condition for testing.

The question then is whether, in the absence of an express exclusionary provision, this language nevertheless requires exclusion of a test result where compliance with the Health and Welfare testing requirements is not shown.

The admissibility of the result of a scientific test such as the blood-alcohol test in I.C. § 18-8004 turns normally on a foundation which establishes the acceptability, validity, reliability and accuracy of the test and test procedures. In the admission of a test result for alcohol concentration the Legislature has concluded that certain foundational elements need not be presented at trial unless such elements are disputed. The Legislature has acknowledged that certain tests, due to a history of reliability and accuracy, are presumed to be valid and acceptable. This has also been acknowledged by the courts. *See State v. Hartwig*, 112 Idaho 370 (Ct.App.1987) (holding that Intoximeter 3000 test result may be offered into evidence without detailed foundation, but reliability of result may be challenged by defendant).

The Legislature has enacted a statutory scheme which allows an expedient method for admitting a blood-alcohol test result into evidence without the need for some

expert testimony. As provided by I.C. § 18-8004(4):

Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho department of health and welfare or by any other method approved by health and welfare shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

When this proposed statute was presented to the Legislature the statement of purpose accompanying the legislation explained that expert witness testimony was an unnecessary burden on the state. Such testimony, if used merely to establish a foundation, provided superfluous verification of a test procedure which the Legislature believed to produce an "extremely reliable" result.

Inherent in this statutory scheme, however, is an awareness by the Legislature of the need for uniform test procedures. An "extremely reliable" test result can only be the product of a test procedure which from previous use is known to be capable of producing an accurate result. This benefit is best provided by strict adherence to a uniform procedure. This was recognized by the Legislature and is apparent first, from the statutory language which provides for the test procedure to be determined by the Idaho Department of Health and Welfare, and second, by the "shall" language mandating adherence to the standards set by that Department.

The acceptance by the Legislature of test procedures as designated by the Idaho Department of Health and Welfare does not wholly eliminate the need of establishing foundational requirements for a test result. This is required even in light of the legislative directive to utilize an expedient means to admit such evidence. The adoption of the particular test procedure merely recognizes the validity and reliability of that particular accepted test. It must still be established at trial that those procedures which ensure the reliability and in turn the accuracy of the test have been met. Absent such a showing, the expedient scheme adopted by the Legislature fails to guarantee the admission of reliable evidence. Without expert witness testimony to establish these necessary foundational elements, compliance with the test procedure must be shown. We hold that to admit the test result the state must provide adequate foundation evidence consisting either of expert testimony or a showing that the test was administered in conformity with the applicable test procedure. Of course, a test result, once admitted, still may be attacked by the defendant. In that event, the trier of fact will determine the ultimate weight to be given the test result.

*Id.* at 37-40. The lower Court in this case seemingly broadened this holding to include the current situation where no method exists. However, the Court in *Bell* was quite clear in finding that the legislature had mandated that a method be created for breath testing. When the Idaho State Police choose to violate this directive, it is clear that no breath test results will be admissible. The lack of a uniform method creates a situation where the breath test results are unreliable, just as the existence of such a method shields that method from criticism because its constant, rigid application maintains its credibility.

The Court of Appeals recently ruled in *State v. Besaw*, 306 P.3d. 219 (Idaho Ct.App.2013) that I.C. § 18-8004(4) merely required that the method be “capable” of producing an accurate result. The Court’s ruling is in error, both in that it overruled *Bell* without employing the proper test, and in that it misinterprets the legislature’s requirements for the executive by ignoring the rules of interpretation for a criminal statute. More fundamentally, no expert, however well trained, can ensure the reliability of a breath test result done without a method. The rule of law cannot ignore the Rules of Scientific Procedure. The laissez faire approach currently adopted by the Idaho State Police cannot ensure reliability to a standard necessary for I.C. § 18-8004(4) or the Fourteenth Amendment of the United States Constitution’s due process protections. This Court should find that the findings in *Besaw* were in error.

Further, this Court should find that the SOPs have been modified so that the word “must” has been replaced by the word “should” in the following instances:

1. The necessity to have the correct acceptable range limits and performance verification standard lot number set in the instrument prior to evidentiary testing- 2.2.11 (1/15/2009) cf. 5.2.10 (1/16/2013).
2. The need to monitor the subject for fifteen minutes prior to the test to ensure there is no alcohol being regurgitated or in the mouth. See 3.1, 3.1.5, 3.1.5.1, 3.1.5.2 (1/15/2009) cf. 6.1, 6.1.4, 6.1.4.1, 6.1.4.2 (1/16/2013).

These changes occurred between the April 23, 2012 version of the SOPs and the latest installment.

Mouth alcohol is an enormous issue with breath testing. *See* Caddy, Sobell, and Sobell, Alcohol Breath Tests: Criterion Times for Avoiding Contamination by 'Mouth Alcohol', 10(6) BEHAVIOR RESEARCH METHODS AND INSTRUMENTATION 814-18 (1978); Breath-Alcohol Concentration May Not Always Reflect the Concentration of Alcohol in Blood, 18 J. ANALYTICAL TOXICOLOGY 225 (July/Aug. 1994); Colorado Department of Health, 6(11) Drinking/Driving L. Letter 5 (May 29, 1987); Kechagias, Jonsson, Franzen, Andersson & Jones, Reliability of Breath-Alcohol Analysis in Individuals with Gastroesophageal Reflux Disease, 44(4) J. FORENSIC SCIS. 814 (1999); Gaylard, Sambuk & Morgan, Reductions in Breath Ethanol Readings in Normal Male Volunteers Following Mouth Rinsing with Water at Differing Temperatures, 22 ALCOHOL & ALCOHOLISM 113 (1987); P. Price, Intoxilyzer: A Bread Testing Device?, 15(4) Drinking/Driving L. Letter 52 (1996) (slope detector failures); Ethanol Content of Various Foods and Soft Drinks and their Potential for Interference with a Breath-Alcohol Test, 22 J. ANALYTICAL TOXICOLOGY 181 (May/June 1998); Michael P. Hlastala, Ph.D., Wayne J.E.

Lamm, M.A. and James Nesci, J.D., The Slope Detector Does Not Always Detect the Presence of Mouth Alcohol, THE CHAMPION, (National Association of Criminal Defense Lawyers), 57-60 (March 2006).

This Court should find that the removal of this requirement renders the SOPs incapable of ensuring accuracy. Further, the history of the Idaho State Police's changes to the SOPs create an issue of credibility. Now that the intentions of the Idaho State Police have been exposed, namely the securing of convictions to the detriment of accurate results, this Court should not find that the currently adopted SOPs can be considered "extremely reliable."

D. This Court should decide that no method exists.

Idaho Code 18-8004(4) mandates that testing for alcohol concentration be done in accordance with methods approved by the Idaho State Police. In supposed compliance with that mandate and authority, the Idaho State Police has issued both "Standard Operating Procedures: Breath Alcohol Testing," ("SOP" or "SOPs") (available at <http://www.isp.idaho.gov/forensics/index.html>) which purports to establish procedures for the maintenance and operation of breath testing equipment as well as training and operations manuals ("manual" or "manuals") (also available at <http://www.isp.idaho.gov/forensics/index.html>) for the various breath testing devices, including the Intoxilyzer 5000EN device used in this case.

The ISP, by using SOPs in the place of regulations, has made an end-run around the requirements of the Idaho Administrative Procedures Act, specifically I.C. §§ 67-5220 – 67-5232 and I.D.A.P.A. 44.01. The ISP promulgated 11.03.01.014.03, which merely states that breath

tests shall be in conformity with standards established by the ISP. Thus, the various changes the ISP makes to its breath testing procedures receive no public scrutiny prior to implementation, which flies in the face of what the legislature had in mind in passing I.C. § 18-8004(4). Under the statutory definition, an agency action is a rule if it (1) is a statement of general applicability and (2) implements, interprets, or prescribes existing law. *See Tomorrow's Hope, Inc. v. Idaho Department of Health and Welfare*, 124 Idaho 843, 846 (1993). The Idaho Supreme Court considers the following characteristics of agency action indicative of a rule: (1) wide coverage, (2) applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy. *Asarco Incorporated v. State*, 138 Idaho 719, 723 (2003). The standard operating procedures for breathalyzer testing promulgated by the Idaho State Police easily fits this definition of a rule.

A comparison of the Idaho Supreme Court's analysis in *Asarco* with I.C. § 18-8004(4) and the Idaho State Police's Standard Operating Procedures shows that the SOPs are rules that fall under the IDAPA.

*1. The TMDL has wide coverage.* The TMDL applies to all current and future dischargers in a specific water body, in this case, the Coeur d'Alene River Basin. Thus, the TMDL is accurately described by the trial court as applying to "a large segment of the general public rather than an individual or narrow select group."

*Asarco*, 138 Idaho at 723. In this case, the SOPs apply to all breath testing that takes place in the state of Idaho and thus to the entire driving population in the state. The scope of the SOPs easily meets this requirement.



2. *The TMDL is applied generally and uniformly.* While the TMDL has characteristics that are both generally applicable and discharger specific, the TMDL, on the whole, is more appropriately described as generally applicable.

The TMDL, in part, constitutes a numerical limit or budget for a given water body, based on the sum of the allowable pollution from all identified point source and nonpoint sources of pollution, as well as natural background levels of the pollutant. I.C. § 39-3602(27); 40 CFR 130.2(i). These sums are based on individual determinations, referred to as load allocations (LA's) and wasteload allocations (WLA's). LA's are defined as the "portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources." 40 CFR 130.2(g). The wasteload allocations (WLA's) represent the "portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution." 40 CFR 130.2(h). The federal regulations further describe the WLA's as "a type of water-quality based effluent limitation." *Id.* In addition, the EPA has used these individualized load allocations as enforceable limits modifying the Mining Companies' NPDES permits accordingly. Thus, focusing on the LA and WLA determinations alone, the TMDL process appears to be discharger specific.

Nevertheless, the individual LA and WLA determinations are just a small part of the entire TMDL process. First, the TMDL considers the LA and WLA allocations in sum in order to determine an over-all effluent limitation budget for the identified water body. This budget applies to all existing and future point and nonpoint source dischargers in a general and uniform manner. Second, the TMDL process outlined by Idaho statute includes the following additional qualitative and quantitative determinations:

- (1) Identification of pollutants impacting the water body;
- (2) An inventory of all point and nonpoint sources of the identified pollutant ...;
- (3) An analysis of why current control strategies are not effective in assuring full support of designated beneficial uses;
- (4) A plan to monitor and evaluate progress toward water quality progress and to ascertain when designated beneficial uses will be fully supported;
- (5) Pollution control strategies for both nonpoint and point sources for reducing those sources of pollution;

(6) Identification of the period of time necessary to achieve full support of designated beneficial uses; and

(7) An adequate margin of safety to account for uncertainty.

I.C. § 39-3611. Clearly these procedures are generally and uniformly applicable and require DEQ to focus on the waterbody as a whole, as opposed to the individual sources of pollution. Therefore, for the above reasons, even though the TMDL involves determinations of specific applicability, the over-all scheme demonstrates the TMDL is more appropriately described as generally and uniformly applicable.

*Id.* at 723-34. The method required by I.C. § 18-8004(4) is intended by the legislature to act as gatekeeper for the introduction of breath test results in DUI cases. I.C. § 18-8004(4) explicitly requires courts to allow the introduction of the breath test results as long as the method is followed in spite of the rules of evidence. The procedures are meant to be “generally and uniformly applicable” so as to guarantee accuracy. *See Wheeler v. Idaho Transportation Department*, 148 Idaho 378, 387 (2009) (Wheeler, J. dissenting) (citing Statement of Purpose, HB 284 (RS13389) (1987)).

3. *The TMDL Operates Only in Future Cases.* The TMDL operates only prospectively and does not adjudicate past actions by the Mining Companies or any other party.

*Id.* at 724. The method that the Idaho State Police must adopt is not retroactive.

4. *The TMDL Prescribes a Legal Standard Not Provided by the Enabling Statute.* As described above, the TMDL constitutes a numerical limit on the total allowable discharge in a specified waterbody. This limit is allocated between point sources and nonpoint sources of pollution. Even if DEQ does not intend to enforce these limitations, and this Court is not determining whether or not it may properly do so, EPA considers these numbers binding and has already used the TMDL in order to reduce the discharge limits reflected in several of the Mining

Companies' NPDES permits. Thus, the TMDL in fact contains quantitative legal standards not provided by either the Clean Water Act or the Idaho Water Quality Act.

*Id.* The legislature requires the Idaho State Police to define a method. I.C. § 18-8004(4). That method creates a legal standard preventing the Court from requiring the state to provide an expert to establish a reliable and accurate breath test. *Id.* Therefore, the method is a legal standard not provided by I.C. § 18-8004(4).

*5. The TMDL Expresses New Agency Policy.* Even if the TMDL is nothing more than a planning tool, as DEQ argues, it is an expression of agency policy not previously addressed. This is true not only of the numerical limits contained in the TMDL, but also the additional requirements contained in the Idaho Water Quality Act, including (1) the analysis of why current control strategies are not effective in assuring full support of designated beneficial uses; (2) the plan to monitor and evaluate progress toward water quality progress and to ascertain when designated beneficial uses will be fully supported; and (3) the identification of pollution control strategies for both nonpoint and point sources for reducing those sources of pollution. I.C. § 39-3611.

*Id.* at 724-25. The method adopted by the Idaho State Police in its Standard Operating Procedures is policy inasmuch as it establishes requirements, parameters, and guidance for police officers performing breath testing.

*6. The TMDL Implements and Interprets Existing Law.* While DEQ argues the TMDL implements the water quality standards, which constitute a rule as opposed to a law, the TMDL actually implements and interprets the directives contained in both the Clean Water Act, as well as the more specific Idaho Water Quality Act.

The central problem with DEQ's argument is the state water quality standards do not provide all of the information or direction necessary for promulgating a TMDL. While the water quality standards serve as a basis for the TMDL calculations, the TMDL requires much more. Under the Idaho Water Quality Act, not only must DEQ identify the pollutants and inventory point and nonpoint sources of pollution, the agency must also analyze why current control strategies

are not effective and develop new pollution control strategies for point and nonpoint sources of pollution. I.C. § 39-3611. In addition, the Idaho Water Quality Act requires DEQ to allocate effluent limitations among point and nonpoint sources of pollution and develop planning processes to monitor and evaluate progress. *Id.* In making these types of decisions, DEQ is working far outside the scope of the water quality standards alone and is both implementing law and creating policy. Thus, DEQ's argument that the TMDL implements a rule as opposed to a law is unpersuasive.

*Id.* Unlike in *Asarco*, there is no colorable argument that the Idaho State Police are not implementing and interpreting I.C. § 18-8004(4). The legislature required the ISP to adopt a method that would act as a guarantor of admissibility in a criminal trial, and the ISP has acknowledged that the SOPs are its attempt to do so. *See* IDAPA 11.03.01.014.03.

Further, the Court of Appeals acknowledged in *Wanner v. State Dept. of Transp.*, 150 Idaho 164 (2011), that hearings held per I.C. § 18-8002A are agency action controlled by IDAPA. It is difficult to understand how the hearings provided are agency action but the methods and rules required are not agency action falling under the requirements of IDAPA.

Therefore, this Court must come to the same conclusion as the Supreme Court in *Asarco*:

In conclusion, the district court correctly determined the establishment of the TMDL involved "rulemaking." Furthermore, because the TMDL is properly considered a rule, it is invalid pursuant to the IAPA.

The IAPA provides, "[a] temporary or final rule adopted and becoming effective after July 1, 1993, is voidable unless adopted in substantial compliance with the requirements of this chapter." I.C. § 67-5231. It is undisputed that DEQ did not comply with formal rulemaking requirements. Rather than arguing it had substantially complied with the rulemaking requirements, DEQ argued it did not have to do so. Thus, the district court correctly held the TMDL is void for failure to comply with state administrative law.

*Asarco*, 138 Idaho at 725. The ISP's SOPs are void. As such, no method exists and the ISP has

failed to comply with the legislature's requirements under I.C. § 18-8004(4) and 18-8002A. Though the Court of Appeals has held that where the method is not complied with an expert may be called to establish reliability, where no method exists at all, reliability cannot be established. *State v. Healy*, 151 Idaho 734, 737 (Ct.App.2011). This is both because the legislature has fixed the admissibility requirements for breath tests and made them conditional on the existence of a method, and because the Court cannot find reliability exists where the agency responsible for establishing a method refuses to do so, ostensibly to take advantage of the fact that few defendants can afford an expert and the ISP's expert will be able to convince any court to introduce the breath test results.

This Court should so hold and remand this case with instructions to exclude the breath test results in this case.

### III.

#### A. Introduction

The Magistrate Court erred in denying the defendant's motion to suppress his breath test because a law providing for various penalties for relying on one's constitutional rights is invalid, as is any consent provided after being warned of those penalties.

#### B. Standard of Review

An appellate court exercises free review over questions of law. *Button*, 134 Idaho 814; *Powell*, 130 Idaho at 125.

- C. A valid consent cannot be produced after the Notice of Suspension for Failure of Evidentiary Testing has been read to a citizen without the state first obtaining a warrant. In *Missouri v. McNeely*, 133 S.Ct. 1552 (U.S.Mo. 2013), the Supreme Court of the

United States held that an officer's belief that a person is currently intoxicated and need to conduct an evidentiary test before the alcohol in their system evaporates does not *per se* create exigent circumstances that allow the officer to forego seeking a warrant.

The state of Idaho, like the other forty-nine states, has adopted what is called an implied consent law. *McNeely, supra*, at 1566-67. In Idaho, implied consent means that a person who has accepted the privilege of operating a motor vehicle upon Idaho's highways, provided that evidentiary testing is administered by a peace officer with reasonable grounds for suspicion of DUI, will physically consent to an evidentiary test. *See State v. DeWitt*, 145 Idaho 709, 712 (Ct.App.2008); I.C. § 18-8002(1). Implied consent is unrelated to and occurs after the warrant required under the Fourth Amendment to the United States Constitution and Art. I § 17 of the Idaho Constitution. *See State v. Woolery*, 116 Idaho 368, 372-374 (1989). However, because it was erroneously held by the Idaho Supreme Court that no warrant was required in a DUI case, the warrant issue has long been overlooked. *See id.*

The text of *Woolery* will be reproduced below for the Court's edification:

As explained by the Wisconsin Supreme Court in *State v. Zielke*, 137 Wis.2d 39, 403 N.W.2d 427 (1987), "the implied consent law is an important weapon in the battle against drunk driving in this state. Neither the law, its history nor common sense allows this court to countenance its use as a shield by the defense to prevent constitutionally obtained evidence from being admitted at trial." 403 N.W.2d 427, 434.

The South Dakota Supreme Court ruling in *State v. Buckingham*, 240 N.W.2d 84 (1976), that noncompliance with the implied consent statutes rendered the blood sample and test results inadmissible in a driving while intoxicated manslaughter prosecution, was overruled just one year later in *State v. Hartman*, 256 N.W.2d 131 (S.D.1977). The court explained:

The Buckingham decision was without the benefit of argument from the state on the question of whether use of the “exclusionary rule” was necessary where there is a violation of the implied consent statutes. Upon further consideration, this court feels that it is necessary to modify the *Buckingham* decision.... Our consideration of the implied consent statutes must be prefaced upon the United States Supreme Court's decision in *Schmerber v. California* [citations omitted in quote] ... The exclusionary rule is a judicially created means of protecting the rights of citizens under the Fourth Amendment and Art. VI, § 11 of the South Dakota Constitution as a deterrent to unlawful police conduct. However, evidence obtained in violation of statutory rights is not inadmissible per se unless the statutory rights are of constitutional proportions or there exists no other method of deterring future violations of the rights which the legislature has granted to its citizens.

*Hartman*, 256 N.W.2d 131, 134-135. In holding that the results of the blood test were admissible, the court explained that **despite the fact the legislature created a specific right of a driver to refuse to submit to a test to determine the alcohol content of his blood, failure to comply with the procedure as set forth in the implied consent statutes does not require suppression of the test results as long as the testing procedure complied with the driver's constitutional rights.** [emphasis added].

The Idaho Legislature has acknowledged a driver's *physical ability to refuse* to submit to an evidentiary test, but it did not create a *statutory right* for a driver to withdraw his previously given consent to an evidentiary test for concentration of alcohol, drugs or other intoxicating substances. [emphasis in original].

Importantly, the pre-1983 statute, I.C. § 49-352, covering implied consent to extract blood for a blood alcohol test, stated: “If such person having been placed under arrest and having thereafter been requested to submit to such chemical test refuses to submit to such chemical test the test shall not be given but the department shall suspend his license or permit to drive....” The 1984 legislature repealed I.C. § 49-352, the legislative precursor of § 18-8002, and adopted § 18-8002 as a part of the new chapter 80 of title 18. In addition to maintaining the pre-1983 implied consent language and the 1983 deletion of the language just discussed, this enactment added a section making it clear that a driver does not have the right to consult with an attorney before submitting to an evidentiary test. The state submits that the elimination of the statutory provision that the test shall not be given if it is refused, the continued use of the pre-1983 implied consent

language, the addition of a specific statutory provision making it very clear that a driver does not have a right to consult with an attorney before submitting to the evidentiary test, along with the statement of purpose enacted as a part of the 1983 Act, reflect the legislative “get tough” policy. This legislative “get tough” policy did not include the creation of a statutory right for a driver to refuse to submit to an evidentiary test requested by an officer who has reasonable cause to believe that such driver is under the influence.

The Oregon Supreme Court in *State v. Newton*, 636 P.2d 393 (1981), explained that the concept of implied consent is a statutory fiction which, at first, appears to be theoretically contradictory[:]

The contradiction disappears, however, when it is realized that the words “consent” and “refusal” are not used as antonyms, because they are not used in the same sense. “Consent” describes a legal act; “refusal” describes a physical reality. By implying consent, the statute removes the right of a licensed driver to lawfully refuse, but it cannot remove his or her *physical power* to refuse. As another court put it:

The obvious reason for acquiescence in the refusal of such a test by a person who as a matter of law is “deemed to have given his consent” is to avoid the violence which would often attend forcible tests upon recalcitrant inebriates.

**It is firmly established that a drunken driver has no *right* to resist or refuse such a test** [citations omitted in quote]. [emphasis added]. It is simply because such a person has the *physical power* to make the test impractical, and dangerous to himself and those charged with administering it, that it is excused upon an indication of his unwillingness.... *Bush v. Bright*, 264 Cal.App.2d 788, 790, 792, 71 Cal.Rptr. 123 at 125 (1968) (original emphasis).

Thus refusal as contemplated by the statute is something other than withholding of consent because consent is legally implied. It is a refusal to comply with the consent which has already been given as a condition of a license to drive. The purpose of a warning of license suspension following a refusal ... is to overcome an unsanctioned refusal by threat instead of force. It is not to reinstate a right to choice, but rather to nonforcibly enforce the driver's previous implied consent.

636 P.2d 393 at 397-398 (original emphasis). *See also State v. Hoehne*, 78 Or.App. 479, 717 P.2d 237 (1986); *State v. Spencer*, 305 Or. 59, 750 P.2d 147 (1988); *Pears v. State*, 672 P.2d 903 (Alaska App.1983), *rev'd on other grounds*,



698 P.2d 1198 (Alaska 1985); *Wirz v. State*, 577 P.2d 227 (Alaska 1978).

The Idaho Legislature has not created a statutory right to refuse to submit to an evidentiary test to determine a driver's blood alcohol level. It is difficult to believe that the Idaho Legislature would provide an individual with the statutory right to prevent the state from obtaining highly relevant evidence when a law enforcement officer has reasonable cause to believe that individual has committed a crime—whether it would be driving under the influence, vehicular manslaughter, sale of controlled substances, or murder. **If the driver's constitutional right to be free from unreasonable searches and seizures is complied with, the state should not be prevented from obtaining such relevant evidence as the alcohol content of the driver's blood.** [emphasis added].

To put it more succinctly, the Court found that:

*[i]n Schmerber, the United States Supreme Court recognized that a warrantless seizure of the blood of a driver, as long as probable cause exists and the withdrawal of the blood is done in a reasonable fashion, does comply with the provisions of the fourth amendment.*

*Id.* at 374. However, the Idaho Supreme Court was manifestly wrong in its interpretation of *Schmerber v. California*, 384 U.S. 757 (1966) and has now been overruled by the United States Supreme Court's ruling in *McNeely*. See *McNeely*, 133 S.Ct. at 1558-59. Therefore, a warrantless evidentiary test in a DUI case is presumptively unconstitutional, and a person does have the right to refuse to do the test unless and until a warrant has been secured or an exception to the warrant requirement exists.

After *Woolery*, cases involving implied consent and the Fourth Amendment followed its reasoning until *Goerig v. State*, 121 Idaho 26, 29 (Ct.App.1992) and *State v. Nickerson*, 132 Idaho 406 (Ct.App.1999). See *State v. McCormack*, 117 Idaho 1009 (1990); *State v. Burris*, 125 Idaho 289 (Ct.App.1994); *Matter of McNeely*, 119 Idaho 182 (Ct.App.1990). The Idaho Court of

Appeals in *Nickerson* misinterpreted *Woolery* as follows:

Nickerson's argument that his consent to the BAC at the police station was involuntary is of no consequence because he had impliedly consented as a matter of law. One who drives a motor vehicle on Idaho's highways is statutorily deemed to have consented to an evidentiary test for blood alcohol concentration. Idaho Code § 18-8002(1) provides that "[a]ny person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol" if the test is administered at the request of a peace officer having reasonable grounds to believe that the person has been driving under the influence of intoxicants. By terms of this statute, anyone who accepts the privilege of operating a motor vehicle upon Idaho's highways has thereby consented in advance to submit to a BAC test. By implying consent, the statute removes the right of a driver to refuse an evidentiary test. Hence, although an individual has the physical ability to prevent a test, there is no legal right to withdraw the statutorily implied consent.

132 Idaho at 410 citing *Woolery*, 116 Idaho at 372; *Burris*, 125 Idaho at 291; *Goerig* 121 Idaho at 29 (Ct.App.1992) ("By implying consent, the statute removes the right of a licensed driver to refuse to take an evidentiary test; however, recognizing that some individuals may refuse to comply with their previously given consent, the legislature provided an administrative process to revoke those persons' licenses." citing *Woolery*, 116 Idaho at 373); *McNeely*, 119 Idaho at 187. Nowhere in these opinions is there an explanation for how the Supreme Court in *Woolery*'s statement that no legal right exists to refuse an evidentiary test for alcohol in a DUI case and that implied consent only dealt with the physical ability to refuse became confused for implied consent itself taking away the legal right to refuse and a person having the physical ability to refuse. Once the mistake was made, however, the courts cited it repeatedly until at last the Supreme Court held it to be true in *Halen v. State*, 136 Idaho 829 (2002). Indeed, the Supreme Court of Idaho even cited to *Nickerson* as its only authority for the concept that implied consent

was consent to a Fourth Amendment search, *sub silentio* overruling its holding in *Woolery*. *Id.* at 833.

However, the Supreme Court's holding is manifestly wrong. The state does not have the power to require consent to a search in violation of the Constitution to use the road. *Woolery*, 116 Idaho at 372 quoting *Hartman*, 256 N.W.2d at 134-135. Certainly, it would be shocking that a state legislature could do to drivers what it cannot do to prisoners. *Hudson v. Palmer*, 468 U.S. 517 (1984) ("We have repeatedly held that prisons are not beyond the reach of the Constitution. No 'iron curtain' separates one from the other."). Rather than simply state that those who choose to live in general population rather than solitary impliedly consent to random shakedowns, the Court has held that prison regulations that inhibit rights are reviewed for their reasonableness. *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Once the Fourth Amendment was applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), one would imagine the states did not retain the ability to simply force their citizens to give up its protections whenever they pleased. The Court's holding would allow the state to vary the protections of the federal Constitution in a manner that hardly seems fitting to something titled "federal." As the federal Supreme Court stated in *Virginia v. Moore*, 553 U.S. 164 (2008) (footnote omitted) citing *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), *Payton v. New York*, 445 U.S. 573, 583-584 (1980); *Boyd v. United States*, 116 U.S. 616, 624-627 (1886):

We are aware of no historical indication that those who ratified the Fourth Amendment understood it as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted. The immediate object of the Fourth Amendment was to prohibit the general warrants and writs of assistance that

English judges had employed against the colonists. That suggests, if anything, that founding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness.

...

Incorporating state-law arrest limitations into the Constitution would produce a constitutional regime no less vague and unpredictable than the one we rejected in *Atwater*. The constitutional standard would be only as easy to apply as the underlying state law, and state law can be complicated indeed.

To the extent that the Supreme Court of Idaho has held that the state may force its citizens to waive their federal constitutional rights to participate in something as universal as driving, it is manifestly wrong. The Bill of Rights is a dead letter if the government it was designed to protect its citizens from may simply waive it on a whim.

*McNeely* holds that it is not reasonable to search a driver's body for signs of intoxication absent a warrant or when an exception to the warrant requirement applies. *McNeely*, 133 S.Ct. at 1558-59. Therefore, the Court has reviewed the reasonableness of the warrantless evidentiary test in DUI cases and indicated that the Constitution requires more than probable cause and the withdrawal of blood being done in a reasonable fashion. *Cf. Woolery*, 116 Idaho at 374. The Constitution requires a warrant.

Further, the state may not punish a citizen for exercising or standing on their constitutional rights. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000).

This Court must determine the validity of consent after a person has been read the Notice of Suspension for Failure of Evidentiary Testing (otherwise known as the ALS form) as it was at

the time of this incident. This form is read by Idaho police to defendants and states:

I have reasonable grounds to believe that you were driving or were in physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances. **You are required by law to take one or more evidentiary test(s)** to determine the concentration of alcohol or presence of drugs or other intoxicating substances in your body. After submitting to the test(s) you may, when practical, at your own expense, have additional test(s) made by a person of your own choosing. You do not have the right to talk to a lawyer before taking any evidentiary test(s) to determine the alcohol concentration or presence of drugs or other intoxicating substances in your body. [emphasis added].

The form goes on to list a litany of punishments that will result if a person refuses, including loss of their driver's license and a fine. The obvious problem with this warning is that the law requiring those tests is unconstitutional until the officer has secured a warrant or has a valid exception to the warrant requirement. A state may not pass a law that visits penalties upon a citizen for exercising a constitutional right. *See Camara v. Municipal Court of the City And County of San Francisco*, 387 U.S. 523, 531-534 (1967) (striking down laws that allow for fines when individuals refuse to consent to warrantless searches of their dwellings); *Columbia Basin Apartment Association v. City of Pasco*, 268 F.2d 791, 797-798 (9th.Cir.2001) (plaintiff tenants have standing to challenge ordinance requiring tenants to allow warrantless searches of their homes or face eviction); *Wilson v. City of Cincinnati*, 346 N.E.2d 666 (Ohio 1976) (striking down ordinance requiring seller of a house to consent to a warrantless search or face a fine between \$5 and \$500 because it coerced a waiver of Fourth Amendment rights). An officer may not threaten to do what he is not legally or constitutionally authorized to do. *Bumper v. North*

*Carolina*, 391 U.S. 543, 548-550 (1968); *State v. Smith*, 144 Idaho 482, 488-89 (2007). The policeman's threat vitiates any consent. *Id.*

Article I Section 17 of the Idaho Constitution affords greater protection than the Fourth Amendment to the United States Constitution based upon the long-standing jurisprudence of the Idaho appellate courts, the uniqueness of the State of Idaho, and the uniqueness of the Idaho Constitution. *See State v. Guzman*, 122 Idaho 981, 995 (1992) (not the exclusionary rule, but the constitutional provision itself impedes fact-finding function of Court- but this is a "price the framers anticipated and were willing to pay"); *State v. Thompson*, 114 Idaho 746 (1988) (Idahoans have a higher expectation of privacy in the home); *State v. LePage*, 102 Idaho 387 (1981) (judicial integrity mandates exclusionary rule); *State v. Rauch*, 99 Idaho 586 (1978) (admission of illegally seized evidence itself a violation of constitution); *State v. Arregui*, 44 Idaho 43 (1927) (application of exclusionary rule in Idaho 34 years prior to *Mapp v. Ohio*, 367 U.S. 643 (1961)); *State v. Cada*, 129 Idaho 224 (Ct.App.1996) (Idahoans have higher expectation of privacy in their land). Thus, the results of the breath test, because they were taken in violation of Article I § 17, must be excluded at trial.

In this case, the defendant was read the ALS form without a warrant being secured. Therefore, the consent given was invalid, and the results of the test should be suppressed. This Court should reverse the denial of the Motion to Suppress the breath test and remand to allow the defendant to withdraw his guilty plea.

CONCLUSION

The case before this Court requires it to determine how far the state may go in violating a citizen's rights to prove a charge of Driving under the Influence. This Court should reverse the lower Court's denial of the defendant's motion to suppress the stop, reverse the conviction, and dismiss this matter. If this Court does not do so, then it should reverse the lower Court's denial of the Motion to Suppress the breath test, and/or the Motion in Limine, and remand for further proceedings, including a requirement that the defendant be allowed to withdraw his plea.

DATED this 11 day of October, 2013.

OFFICE OF THE KOOTENAI  
COUNTY PUBLIC DEFENDER

BY:


  
JAY LOGSDON, ISB 8759  
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I have this 15 day of October, 2013, served a true and correct copy of the attached BRIEF SUPPORTING APPEAL via interoffice mail or as otherwise indicated upon the parties as follows:

Coeur d'Alene Prosecutor FAX 769-2326



STATE OF IDAHO}  
County of Kootenai}ss  
FILED: 10-17-13  
at 11:45 o'clock AM.  
CLERK, DISTRICT COURT  
  
Deputy

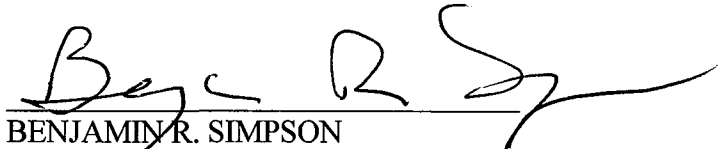
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,	)	
	)	
Plaintiff,	)	CASE NO. CR 2013-5363
	)	
Vs.	)	ORDER OF VOLUNTARY
	)	DISQUALIFICATION
JESSE CARL RIENDEAU,	)	
	)	
Defendant.	)	
_____	)	

It appearing to the court that the ends of justice would best be served by another Judge handling the above entitled matter;

NOW THEREFORE, IT IS HEREBY ORDERED that, pursuant to CR RULE 25(d), the undersigned is hereby disqualified from presiding further in the above entitled matter.

ENTERED this 17 day of October, 2013.

  
BENJAMIN R. SIMPSON  
District Judge #101



CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing ORDER was placed in the courthouse mailing system, postage prepaid, inter office mail, or by facsimile on the 17 day of October, 2013 to:

CITY PROSECUTOR  
FAX: 208-769-2326

PUBLIC DEFENDER  
FAX: 208-446-1701

CLIFFORD T. HAYES  
Clerk of the District Court

BY: 

Deputy Clerk

ORDER OF VOLUNTARY DISQUALIFICATION

**FIRST JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF KOOTENAI  
324 W. GARDEN AVENUE  
COEUR D'ALENE, IDAHO 83814**

FILED 10/23/2013 AT 09:35 AM  
STATE OF IDAHO, COUNTY OF KOOTENAI SS  
CLERK OF THE DISTRICT COURT  
BY [Signature] DEPUTY

STATE OF IDAHO,  
Plaintiff.

vs.

Jesse Carl Riendeau  
1138 N 10th St  
Coeur D'alene, ID 83814

Defendant.

Case No: CR-2013-0005363

ORDER ASSIGNING JUDGE ON  
VOLUNTARY DISQUALIFICATION

The Honorable Benjamin Simpson, being disqualified pursuant to I.C.R. 25(d) from proceeding further in the above entitled action:

IT IS HEREBY ORDERED that the Honorable Lansing L. Haynes, of the First Judicial District of the State of Idaho, is hereby assigned to take jurisdiction of the above entitled action for all further proceedings herein.

IT IS FURTHER ORDERED that the Clerk of the District Court of Kootenai County shall cause a copy of this Order Assigning Judge on Disqualification to be mailed or faxed to counsel for each of the parties, or if either of the parties are represented pro se, directly to the pro se litigant.

DATED this 23 day of October, 2013.

Lansing L. Haynes

Lansing L. Haynes, Administrative District Judge

I certify that copies of this Order were served as follows:

☒ Coeur d' Alene Prosecutor [ ] Interoffice Delivery ☒ Faxed (208) 769-2326

☒ Defendant's Counsel: Jay Logsdon, Deputy Public Defender

Interoffice Delivery

Coeur d'Alene ID 83816-9000

Mailed \_\_\_\_\_ Hand Delivered \_\_\_\_\_ ☒ Faxed (208) 446-1701

Dated: October 23, 2013

Clifford T. Hayes

Clerk Of The District Court

By: [Signature]

Deputy Clerk

2426

2013 OCT 23 AM 9:41

CLERK DISTRICT COURT

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

DEPUTY

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

JESSE CARL RIENDEAU,

Defendant.

CASE NO. CR 2013-5363

ORDER OF REASSIGNMENT

IT IS HEREBY ORDERED that the above matter is reassigned to the Honorable **John R. Stegner**, Administrative District Judge for the Second Judicial District, for the reassignment to a District Judge from the Second Judicial District for all further proceedings. Pursuant to the Idaho Supreme Court Amended Order for Assignment of Judges to the First Judicial District dated July 1, 2012, this reassignment shall be considered an appointment by the Supreme Court pursuant to Idaho Rule of Civil Procedure 40(d)(1)(iii).

DATED this 23 day of Oct., 2013.

Lansing L. Haynes

LANSING L. HAYNES

Administrative District Judge for the  
First Judicial District

CERTIFICATE OF MAILING

I hereby certify that on the 23 day of Oct., 2013, a true and correct copy of the foregoing was sent via facsimile, to the following:

Honorable John R. Stegner  
Faxed: 208-883-5719

Honorable Lansing L. Haynes  
Interoffice mail

Coeur d'Alene City Prosecutor  
Faxed: 208-769-2326

Jay Logsdon  
Kootenai County Public Defender  
Faxed: 208-446-1701

CLIFFORD T. HAYES  
CLERK OF THE DISTRICT COURT

By Jay Logsdon  
Deputy Clerk

2427

# In the Supreme Court of the State of Idaho

ASSIGNMENT OF SECOND DISTRICT JUDGES )  
TO THE FIRST JUDICIAL DISTRICT )

AMENDED ORDER

Upon recommendation of the Administrative Director of the Court, the Court has determined a need for additional judicial assistance in the First Judicial District of the State of Idaho and the assignment of Second Judicial District Judges JEFF BRUDIE, CARL KERRICK, JOHN STEGNER and MICHAEL GRIFFIN is necessary and will promote the efficient administration of justice; therefore,

IT HEREBY IS ORDERED that Judges JEFF BRUDIE, CARL KERRICK, JOHN STEGNER and MICHAEL GRIFFIN be, and hereby are, ASSIGNED to the First Judicial District, and appointed to preside in any cases as may be designated by the Administrative District Judge in the First Judicial District and assigned by the Administrative District Judge in the Second Judicial District to conduct all proceedings necessary for their final disposition, or until further order of the Court.

IT FURTHER IS ORDERED that the reporting of any proceeding in the District Court assigned to judges JEFF BRUDIE, CARL KERRICK, JOHN STEGNER and MICHAEL GRIFFIN may be by an electronic recording in accordance with the provisions of Idaho Court Administrative Rule 27.

IT FURTHER IS ORDERED that the assignment of cases in the First Judicial District to Judges JEFF BRUDIE, CARL KERRICK, JOHN STEGNER and MICHAEL GRIFFIN shall be considered appointments by the Supreme Court and that, pursuant to Rule 40(d)(1)(i)(ii) of the Idaho Rules of Civil Procedure, and beginning from the date of this Amended Order, there shall be no right to disqualify these judges without cause in any of the First Judicial District cases to which they are assigned.

IT FURTHER IS ORDERED that a copy of this Order shall be placed in a pro tem judge assignments file to be maintained by the District Court Clerk as a central register of all assignment orders.

DATED this 10<sup>th</sup> day of August, 2012, NUNC PRO TUNC to the date of July 1, 2012.

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.

By Order of the Supreme Court

R. S. Burdick  
Roger S. Burdick, Chief Justice

WITNESS my hand and the Seal of this Court 8/12/12.  
ATTEST:

Stephen W. Kenyon  
Stephen W. Kenyon, Clerk

By: Kimberly Grace Deputy  
cc: Admin. District Judge John Stegner  
Admin. District Judge John Mitchell  
Trial Court Admin. Karlene Behringer  
Trial Court Admin. Jay Gaskill

District Judge Carl Kerrick  
District Judge Jeff Brudie  
District Judge Michael Griffin  
Admin. Director of the Courts, Patil Tobias

STATE OF IDAHO } ss  
COUNTY OF KOOTENAI  
FILED: 10/24/13  
AT 4:38 O'CLOCK P.M.  
CLERK DISTRICT COURT  
*James Hoffmann*  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JESSE CARL RIENDEAU, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. CR-2013-5363  
**ORDER ASSIGNING JUDGE**

It is **ORDERED** that Judge John R. Stegner, whose chambers are located in Moscow, Idaho, is assigned to preside over all further proceedings in the above-entitled matter.

DATED this 24<sup>th</sup> day of October 2013.

*John R. Stegner*  
John R. Stegner  
Administrative District Judge

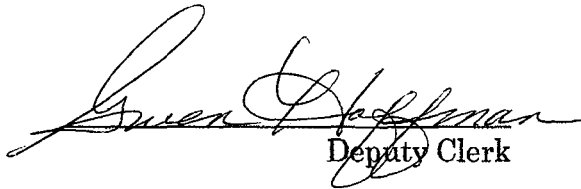
**CERTIFICATE OF SERVICE**

I do hereby certify that a full, true, complete  
and correct copy of the foregoing ORDER  
ASSIGNING JUDGE was transmitted by facsimile to:

Coeur d'Alene City Prosecutor  
(208) 769-2325

Jay Logsdon  
Kootenai County Public Defender  
(208) 446-1701

on this 24 day of October 2013.

  
Deputy Clerk

STATE OF IDAHO } ss  
COUNTY OF KOOTENAI  
FILED: 11/26/13  
AT 10:32 O'CLOCK A.M.  
CLERK, DISTRICT COURT.  
*[Signature]*  
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,	)	Case No CR-2013-5363
	)	
Plaintiff,	)	<b>ORDER FIXING BRIEFING</b>
	)	<b>SCHEDULE AND SETTING</b>
vs.	)	<b>ORAL ARGUMENT</b>
	)	
JESSE CARL RIENDEAU,	)	
	)	
Defendant.	)	

Jesse Carl Riendeau has filed an appeal in which he seeks a review of the Judgment and Sentence entered on August 8, 2013, by Magistrate Judge Barry Watson. It appears, from a review of the record, that the clerk's record and reporter's transcript were lodged with the Court and served upon counsel on September 24, 2013. No objection to the transcript having been filed, the transcript was settled on October 16, 2013. The case was reassigned to Second District Judge John R. Stegner and the record was filed with this Court on October 24, 2013.

Good cause appearing, IT IS ORDERED:

(1) Appellant's opening brief shall be served and filed no later than December 26, 2013;

(2) Appellee's brief shall be served and filed no later than January 16, 2013;


**ORDER FIXING BRIEFING SCHEDULE AND SETTING ORAL**



(3) Appellant's reply brief, if any, shall be served and filed no later than  
January 23, 2014;

(4) Oral argument will be heard commencing at 11:30 A.M. on February 7,  
2014, at the Kootenai County Courthouse in Coeur d'Alene, Idaho.

Dated this 25<sup>th</sup> day of November 2013.

  
\_\_\_\_\_  
John R. Stegner  
District Judge

### CERTIFICATE OF SERVICE

I do hereby certify that full, true, complete, and correct copies of the foregoing  
order were delivered in the following methods to:

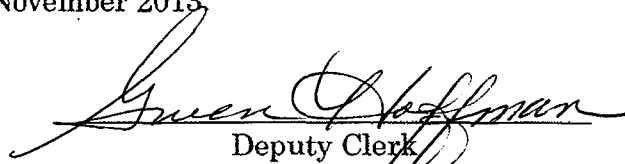
Coeur d'Alene City Prosecutor  
(208) 769-2325

[ ] U.S. Mail  
[ ] Overnight Mail  
☒ Fax ~ 769-2324  
[ ] Hand Delivery

Jay Logdson  
Kootenai County Public Defender's Office  
P.O. Box 9000  
Coeur d'Alene, Idaho 83816

[ ] U.S. Mail  
[ ] Overnight Mail  
☒ Fax ~ 446-1701  
[ ] Hand Delivery

On this 26 day of November 2013,

  
\_\_\_\_\_  
Deputy Clerk

**ORDER FIXING BRIEFING SCHEDULE AND SETTING ORAL**

CITY ATTORNEY'S OFFICE  
 710 E. MULLAN AVENUE--PROS  
 COEUR D'ALENE, IDAHO 83814  
 TELEPHONE: (208) 769-2323

STATE OF IDAHO } SS  
 COUNTY OF KOOTENAI }  
 FILED

2014 JAN 16 PM 3:14

CLERK DISTRICT COURT  
*Barbara Acange*  
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

BU

STATE OF IDAHO,	)	
	)	CASE NO. CR-2013-0005363
Plaintiff-Respondent,	)	
	)	
vs.	)	BRIEF OF RESPONDENT
	)	
JESSE CARL RIENDEAU,	)	
	)	
Defendant-Appellant.	)	
_____	)	

BRIEF OF RESPONDENT

Appeal from the Magistrate Division  
 of the First Judicial District  
 in and for the County of Kootenai  
 HONORABLE BARRY E. WATSON  
 Magistrate  
 TO  
 HONORABLE JOHN R. STEGNER  
 APPELLATE JUDGE

ROY GOWEY  
 Deputy City Attorney  
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 Deputy Public Defender  
 400 Northwest Blvd  
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 (208) 446-1701  
 ATTORNEY FOR APPELLANT

BRIEF OF RESPONDENT: 1

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## STATEMENT OF THE CASE

### (i) *Nature of the Case*

This is an appeal from the magistrate's denial of Defendant Riendeau's several motions to suppress and in limine.

### (ii) *Course of Proceedings Below*

Jesse Riendeau was charged by uniform citation with driving under the influence on March 31, 2013. He pled not guilty and requested trial by jury. He filed several pre-trial motions to suppress and in limine. These motions were heard on May 10 and May 20, 2013. In addition to testimony of the arresting officer on May 10 and of an ISP forensic scientist on May 20, documents and video recordings were also admitted into evidence. On May 10 the magistrate made some findings. On May 24, 2013, the magistrate heard argument on the motions and announced his decision denying all of them. Riendeau subsequently entered a conditional guilty plea to the DUI charge, preserving his right to appeal the denials of his pre-trial motions. This appeal was timely filed.

### (iii) *Statement of Facts*

Coeur d'Alene Police Officer Mario Rios was on duty on March 31, 2013. Tr p. 7, LL. 22-24. He was driving westbound on Harrison Avenue. Tr p. 8, L. 17. He saw a vehicle approaching from the opposite direction and noticed it was way over in the bike lane. Tr p. 8, L. 22-p. 9, L. 1. The oncoming vehicle was far over in the bike lane, near the curb. Tr p. 9, LL. 7-10.

BRIEF OF RESPONDENT: 4

Rios's police car video, admitted as Plaintiff's Exhibit 2, when paused at approximately 51 seconds into it, shows just how far over the oncoming vehicle was.

After the eastbound vehicle passed, Rios turned his police car around and followed it. Tr p. 11, LL. 1-4. By the time Rios caught up to the vehicle, its driver (who was subsequently identified as Defendant Riendeau) had stopped on his own volition and was getting out of his vehicle. Tr p. 12, LL. 4-6. Rios did not activate his patrol car's overhead lights and he did not park so as to block Riendeau's vehicle. Tr p. 12, LL. 7-13.

Riendeau stepped out of his vehicle and approached Officer Rios, talking to Rios as he did. Tr p. 12, LL. 17-21. Rios at once noticed Riendeau was "very slow in his reaction....his speech was slurred....he was fiddling with his food....he was almost clumsy with the way he was movin' with his food." Tr p. 13, LL. 5-8. At that point Rios did not detect an odor of alcoholic beverage, but "it was very windy that night," Tr p. 38, LL. 11-12, which wind was audible on the video, Tr p. 95, LL. 9-10, and Riendeau "was wearing an overwhelming cologne." Tr p. 38, LL. 12-13.

At approximately 2:10 into the patrol car video, Rios asked Riendeau for his driver's license. Riendeau complied with that request.

Riendeau denied he had consumed any alcoholic beverages or taken any drugs, but based on what Rios had observed up to that point---"the lethargic movements, the slurred speech, and the driving pattern," Tr p. 14, LL. 16-18---Rios asked him to submit to standard field sobriety tests. Riendeau complied with that request. Tr p. 15, L. 14-p. 23, L. 6. At the conclusion of the tests, Rios arrested Riendeau. Tr p. 23, LL. 8-9.

Rios transported Riendeau to the Kootenai County Safety Building, otherwise known as the jail. Following the preliminary matters conducted by jail staff, Tr p. 23, L. 18-p. 24, L. 7, Rios commenced the process for offering Riendeau a breath test. This process included checking

Riendeau's mouth and determining it was clear of foreign substances, Tr. p. 24, L. 24-p. 25, L. 2, instructing him "don't belch, burp, vomit,...anything from [his]...stomach, Tr p. 24, LL. 5-7, and observing him for a 15-minute observation period, Tr p. 24, LL. 10-17. Rios also read the license suspension advisory form to Riendeau, Tr p. 25, L. 23-p. 26, L. 9.

When that process was completed, Rios went through the steps to offer Riendeau a breath test on the Intoxilyzer, Tr p. 27, L. 5-p. 30, L. 20. Rios then asked Riendeau to submit to the breath test. Tr p. 30, LL. 21-23. Riendeau complied with that request. Tr p. 24, LL. 24-25. While the officer's testimony clearly misplaced the decimal point in the breath test results produced by Riendeau, Tr p. 31, L. 13, the magistrate concluded after viewing the video of the breath testing procedure that the results were .17 and .18, Tr p 99, L. 18.

### **ISSUES PRESENTED ON APPEAL**

On page 6 of his "BRIEF SUPPORTING APPEAL," Mr. Riendeau sets out the following five issues:

- I. Whether the defendant was free to leave when the officer followed him onto his property, called out to him, and then ignored his requests to let him go inside his home.
- II. Whether the officer had reasonable and articulable suspicion that the defendant had committed a crime when he stopped him on his lawn.
- III. Whether the Idaho State Police have properly promulgated rules for the administration of breath testing.
- IV. Whether the Idaho State Police have promulgated rules that ensure accuracy as required by I.C. §18-8002A and I.C. §18-8004(4).

V. Whether the Administrative License Suspension advisory invalidates the defendant's consent to providing a breath sample under the Fourth Amendment of the United States Constitution and Article I §17 of the Idaho Constitution.

### ARGUMENT

For reasons not clear to the State, despite enumerating *five* issues in the Issues on Appeal section of his brief, Mr. Riendeau in his Argument section divides matters into *three* segments that are indicated by Roman numerals I, II, and III. As best as State can ascertain, Riendeau's Argument I addresses both his Issues I and II. Similarly, it appears his Argument II subsumes his Issues III and IV. It logically (albeit perplexingly) follows then that his Argument III takes up his Issue V. However, the exact assertions he makes in these Argument segments are phrased somewhat differently than their apparent corresponding Issues, so Respondent State cannot be certain just how Riendeau's arguments correlate with his issues.

State surmises the following pairs of issues and arguments were intended by Appellant to be equivalents.

Issue I, "Whether the defendant was free to leave when the officer followed him onto his property, called out to him, and then ignored his requests to let him go inside his house," apparently corresponds to Argument I C 1, "The Officer seized the defendant when he stopped him on his lawn and asked for his driver's license."

Similarly, Issue II, "Whether the officer had reasonable and articulable suspicion that the defendant had committed a crime when he stopped him on his lawn," appears linked to Argument I C 2, "The officer acted on a mere hunch."



Issue III, “Whether the Idaho State Police have properly promulgated rules for the administration of breath testing,” seems to cover the same ground as Argument II C, “I.C. § 18-8004(4) requires the Idaho State Police to create a method for breath testing and without a method ensuring extremely reliable results the results are not admissible.”

Issue IV, “Whether the Idaho State Police have promulgated rules that ensure accuracy as required by I.C. § 18-8002A and I.C. § 18-8004(4) apparently corresponds with Argument II D, “This Court should decide that no method exists.”

Finally, then, Issue V, “Whether the Administrative License Suspension advisory invalidates the defendant’s consent to providing a breath sample under the Fourth Amendment of the United States Constitution and Article I § 17 of the Idaho Constitution,” meshes with Argument III C, “A valid consent cannot be produced after the Notice of Suspension for Failure of Evidentiary Testing has been read to a citizen without the state first obtaining a warrant.”

This naturally makes how to respond to Riendeau’s issues and arguments problematic. Should State respond to the five issues as set out in the Issues section of Riendeau’s Brief Supporting Appeal, or to the differently-worded assertions stated within the three sections of his Argument portion of his brief? Faced with that choice, State will respond to what it perceives actually are the issues Riendeau raises on appeal.

**I. DEFENDANT WAS NOT DETAINED UNTIL THE OFFICER REQUESTED  
DEFENDANT’S DRIVER’S LICENSE, BY WHICH TIME THERE WAS  
LEGAL JUSTIFICATION FOR THE DETENTION.**

No traffic stop occurred here. Riendeau had stopped his vehicle on his own. Officer Rios never activated his patrol vehicle’s overhead lights, nor did he block in the defendant’s

vehicle. When Riendeau got out of his car, *he* approached the officer and initiated the contact with him.

Riendeau in his brief correctly points out that an officer taking a driver's license generally constitutes a seizure. *State v. Osborne*, 121 Idaho 520, 524 (Ct. App. 1991). The magistrate had made his findings and conclusions and denied the motions before Riendeau asked him to say at what point the seizure occurred. Tr p. 104, LL. 3-7. Only at that point did the magistrate say Defendant was not free to leave when the officer started the field sobriety tests. Tr p. 104, LL. 8-18. The magistrate was incorrect to indicate the detention did not occur until the start of the field sobriety tests, but that does not invalidate his conclusion that the motion to suppress should be denied.

The magistrate found that, at the point Rios requested Riendeau perform field sobriety tests, there was reasonable articulable suspicion to detain Rios. A careful review of the record shows Rios also possessed reasonable articulable suspicion at the time he asked for Riendeau's driver's license.

Rios's request of Riendeau's driver's license occurred at approximately two minutes and 10 seconds into the patrol car video. But as that video clearly shows, by that time the officer had gathered a significant amount of information.

At that point, Rios had observed Riendeau driving far to the right of the travel lane of Harrison Avenue, so far into the marked bicycle lane that his vehicle came close to the right curb. Almost as soon as Riendeau got out of his vehicle and approached the officer, Rios noted "slow, lethargic movements,...impaired speech," Tr p. 13, L. 17. He considered that in conjunction with the driving he had observed. Even though at that point Rios did not detect an odor of alcoholic beverage---due to a combination of strong wind and strong cologne---he drew on his training and

BRIEF OF RESPONDENT: 9

experience to assess what he had observed. (Rios recounted his training to the court. Tr p. 14, L. 24-p. 15, L. 8.)

At the point Rios requested Defendant's driver's license, all these observations had been made. Using his training to assess those observations, Rios had reasonable articulable suspicion that Riendeau had violated the law. The magistrate found--- and State maintains this finding also applies at the point Rios requested Riendeau's driver's license---that the officer possessed reasonable articulable suspicion that Riendeau had been driving under the influence in violation of I.C. §18-8004. Even if the Court hearing this appeal should not agree with that, State maintains the observed driving itself provided reasonable, articulable suspicion that Riendeau had been driving inattentively in violation of I.C. §49-1401(3). In either situation, Rios was justified in detaining Riendeau to investigate further.

## **II. THE OFFICER DID NOT ACT ON A MERE HUNCH BUT INSTEAD HAD LEGAL JUSTIFICATION FOR THE ACTIONS HE TOOK.**

In addition to the justifications for detaining Defendant that are addressed in I above, State points out that driving in a bike lane is a violation of Coeur d'Alene Municipal Code Section 10.40.010. This was pointed out in State's argument at the May 24, 2013 hearing before the magistrate. Tr p. 87, LL. 11-14. Appellant misreads the findings of *State v. Morgan*, 154 Idaho 109 (2013): *Morgan* does not hold that a local ordinance must be produced in evidence. Instead, there the Idaho Supreme Court denied a motion by the prosecution to augment the record on appeal by adding a city ordinance (in support of a heretofore unraised basis for the stop) on due process grounds, "holding *Morgan* had not had a fair opportunity to present evidence with regard to the [city ordinance]." *Id.* at 112. Appellant likewise misreads *State v. Doe*, 146 Idaho 386 (Ct. App. 2008), when he suggests a court may not take judicial notice of a local ordinance. *Doe* held that

“[i]f an ordinance’s existence is not reasonably in dispute because it is generally known within the territorial jurisdiction of the trial court, or is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, then it may be accepted as evidence by judicial notice.” *Id.* at 389.

Even if the Court finds the city ordinance prohibiting driving a motor vehicle in a bike lane was not available for the magistrate’s consideration, State maintains that same driving pattern was a violation of I.C. §49-637, failure to maintain lane of travel. While that is an infraction, it is still sufficient to be the basis for the requisite reasonable suspicion. Contrary to what Riendeau implies in his argument, reasonable suspicion need not be of *criminal* conduct. “A traffic stop, which constitutes a seizure under the Fourth Amendment, must be supported by reasonable articulable suspicion that [among other things] the vehicle is being driven *contrary to traffic laws*.” *State v. Naccarato*, 126 Idaho 10, 12 (Ct. App. 1994) (*emphasis added*).. There is no denying the 49-637 state code violation required no judicial notice *and* gave Rios reasonable articulable suspicion to stop Riendeau: the fact no traffic stop occurred because Riendeau stopped himself in no way vitiates this legal justification the officer had for detaining him.

### **III. ISP NEED NOT AND SHOULD NOT BE PROMULGATING BREATH TESTING SOP’s PURSUANT TO IAPA.**

Appellant is mistaken in his claim that *State v. Besaw*, 155 Idaho 134 (Ct. App. 2013), is in error. He says “it is in error, both in that it overruled *Bell* without employing the proper test, and in that it misinterprets the legislature’s requirements for the executive by ignoring the rules of interpretation for a criminal statute.” Brief Supporting Appeal at p. 15. But saying that does not make it true.

*State v. Besaw* is an Idaho Court of Appeals decision, good law at the time of this writing and, as such, binding on all lower courts throughout the state.

Riendeau states that “[m]outh alcohol is an enormous issue with breath testing,” Brief Supporting Appeal, p. 16, and then proceeds to take up the better part of a page citing articles about mouth alcohol. State does not disagree that avoidance of the misleading effects of mouth alcohol is important for the accuracy of breath testing results. But neither at the hearings on his pre-trial motions nor in this appeal has Riendeau presented evidence that shows the breath testing procedures used here are not accurate. In fact, the only evidence presented on the breath testing procedures during the motion hearings was by Jeremy Johnston, a forensic scientist with the Idaho State Police Forensic Laboratory. Tr p. 67, L. 25-p. 81, L. 24. That evidence supported the reliability of the breath testing procedures.

#### **IV. DEFENDANT HAS NOT DEMONSTRATED THE BREATH TESTING PROCEDURE WAS UNRELIABLE.**

Defendant is also mistaken when he argues that *Asarco Incorporated v. State*, 138 Idaho 719 (2013) requires ISP to follow the Idaho Administrative Procedure Act (IAPA) in approving breath testing methods. The Idaho Court of Appeals has said as much: “We conclude that IAPA does not apply when the Idaho state police approves the methods for determining an individual’s alcohol concentration.” *State v. Alford*, 139 Idaho 595, 597 (Ct. App. 2004). There a criminal defendant tried to exclude breath results obtained using the Alco-Sensor III because IAPA had not been followed. The Court in *Alford* considered the six “characteristics of agency action indicative of a rule” that the Idaho Supreme Court had set out in *Asarco* and found at least three of those characteristics were lacking. *Id.* “The DUI statute already prescribes the legal standard limiting an individual’s alcohol concentration,” the Court of Appeals points out. *Alford* at 598. In other

words, the standard is already legislatively established by I.C. §18-8004(4). “Idaho state police properly carried out a statutory duty to authorize the use of certain breath testing equipment by law enforcement agencies....It did not create additional legal requirements. Thus, the state was not required to provide evidence of Idaho state police compliance with IAPA in approving the use of the [breath testing device].” *Alford* at 598. The fact the breath testing device used in the instant case was an Intoxilyzer 5000 rather than an Alco-Sensor in no way changes the legal analysis and the legal conclusion here. ISP was not required to comply with IAPA when it promulgated the standards for administration of breath tests.

Besides erroneously arguing that *Asarco* controls here when *Alford* clearly states it does not, Riendeau in this argument also relies heavily on the dissent in *Wheeler v. Idaho Transportation Department*, 148 Idaho 378 (Ct. App. 2009). Just as the unanimous opinion in *Besaw* points out about the defendant’s argument there, so too does that observation apply here:

It is problematic for Besaw’s argument that the analysis from *Wheeler* upon which he relies was in a *dissent*. By definition, it did not command agreement from a majority of this Court. Specifically, the majority opinion did not adopt the dissent’s view that nonmandatory standards would be tantamount to no standards at all. It is the majority opinion in *Wheeler* that constitutes precedent to which this Court must adhere under the principles of *stare decisis*.

*State v. Besaw*, 155 Idaho 134, 144 (Ct. App. 2013) (*emphasis in the original*).

**V. THE NOTICE OF SUSPENSION FOR FAILURE OF EVIDENTIARY  
TESTING DID NOT RENDER DEFENDANT’S CONSENT TO THE  
BREATH TEST INVALID.**

Riendeau’s final argument centers around the claims that (1) *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) applies to breath tests to generally require a warrant for the seizure of the breath

samples and (2) notification of the civil consequences of taking and failing a breath test must invalidate the breath test subject's consent to the test. Neither of these claims holds up under the weight of relevant legal authority.

*McNeely* dealt with the issue of forced blood draws. This case involves a consensual breath test. No matter how much force Riendeau may use to try to make the main finding in *McNeely* fit this case, he cannot do it. The magistrate here in findings he made on May 10 addressed the *McNeely* argument. Tr p. 51, L. 15-p. 52, L. 11. He noted that "we don't have a blood draw involved here. What we do have is a breath test....I don't think the officer can force the person to blow into the machine." Tr p. 52, LL. 1-6.

In his findings on May 24 the magistrate did "not find that there [was] any coercion of Mr. Riendeau to take the test." Tr p. 98, LL. 8-9. He did not find that "indicating to somebody that if they don't take the test their license is going be suspended or a civil penalty will be imposed or anything, I don't find that that is....coercion." Tr p. 98, LL. 10-13.

While *McNeely* concerned forced blood draws, nonetheless it provided some indication of the effect of implied consent laws:

States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense....Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used against him in a subsequent criminal prosecution.

*Missouri v. McNeely*, 133 S.Ct. 1552, 1566 (2013).

And in doing so, *McNeely* clearly seems to be upholding these implied consent laws and the penalties for withdrawing that consent. The notification of those consequences allows a motorist to make an informed decision on whether to consent to and take the offered test and be subject to the consequences of that or to withdraw consent and suffer the consequences of that withdrawal. Most decisions a person makes have choices, and most choices have consequences. Consent is not invalidated merely because withdrawal of the consent has consequences. Once again Mr. Riendeau seems to be misinterpreting part of a court decision while ignoring, in this instance, another part of the same court decision that does not support his position.

### CONCLUSION

Based on the foregoing argument and authorities, State respectfully requests that this Court uphold the magistrate's denial of all of Respondent's pre-trial motions to suppress and in limine.

DATED this 16th day of January, 2014.



ROY GOWEY, ATTORNEY FOR RESPONDENT

### CERTIFICATE OF MAILING/SERVICE

I HEREBY CERTIFY that I mailed/delivered a true and correct copy of the foregoing Brief of Respondent, by regular U.S. Mail, postage prepaid or by Interoffice Mail at the Kootenai County Courthouse or by facsimile transmission to:

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this \_\_\_ day of November, 2011.

BRIEF OF RESPONDENT: 15



ORIGINAL

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STATE OF IDAHO  
COUNTY OF KOOTENAI } ss  
FILED:

2014 JAN 22 PM 2:49

CLERK DISTRICT COURT

Sabrina Thome  
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

**STATE OF IDAHO,**

Plaintiff/  
Respondent,

V.

**JESSE CARL RIENDEAU,**

Defendant/  
Appellant.

**CASE NUMBER CR-13-0005363**  
**Misd**

**REPLY BRIEF**

Appeal from the Magistrate Court of the First Judicial District for Kootenai County.

Honorable Barry Watson presiding.

**ATTORNEY FOR THE PLAINTIFF:**

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**ATTORNEY FOR DEFENDANT:**

**JAY LOGSDON**  
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## ISSUES PRESENTED

- I. Whether the defendant was free to leave when the officer followed him onto his property, called out to him, and then ignored his requests to let him go inside his home.
- II. Whether the officer had reasonable and articulable suspicion that the defendant had committed a crime when he stopped him on his lawn.
- III. Whether the Idaho State Police have properly promulgated rules for the administration of breath testing.
- IV. Whether the Idaho State Police have promulgated rules that ensure accuracy as required by I.C. § 18-8002A and I.C. § 18-8004(4).
- V. Whether the Administrative License Suspension advisory invalidates the defendant's consent to providing a breath sample under the Fourth Amendment of the United States Constitution and Article I § 17 of the Idaho Constitution.

## ARGUMENT

### I.

The state contends in its brief that the defendant originally approached the officer of his own volition. Thus, the state contends that after a reasonable person has been followed for miles by a police car and has arrived at home to find the officer stopping at their home and getting out

and walking onto their property, and the officer speaks first in an accusatory tone, that no seizure occurs because the reasonable man was apparently affable at 2:00 AM and wanted company.

It is not unusual for the state to argue that the reasonable man indulges the police at every opportunity. However, it is unusual for courts to accept the absurdity the state is forced to present. In *U.S. v. Robertson*, 736 F.3d 677, 680-81 (4th Cir.2013), the Court ruled that:

This case turns on the difference between voluntary consent to a request versus begrudging submission to a command. Here, Mr. Robertson's behavior was the latter. The area around the bus shelter was dominated by police officers. *See U.S. v. Lattimore*, 87 F.3d 647, 650 (4th Cir.1996) (citing number of officers present as a factor weighing against consent). There were three patrol cars and five uniformed officers with holstered weapons. Before the encounter, Mr. Robertson observed every other individual in the bus shelter get "handled by" the other police officers. (J.A. 46.) As these individuals were being dealt with, yet another officer approached the bus shelter and focused on Mr. Robertson.

The officer's questioning was immediately accusatory: Officer Welch's first question was whether Mr. Robertson had anything illegal on him. *See U.S. v. Elie*, 111 F.3d 1135, 1145 (4th Cir.1997) (arguing that friendly conversation rather than accusatory questions militates towards consent). When Mr. Robertson responded with silence, the officer waved Mr. Robertson forward and asked to conduct a search. Mr. Robertson's exit was blocked by Officer Welch, who never informed Mr. Robertson that he had the right to refuse the search. *See Lattimore*, 87 F.3d at 650 (citing individual's knowledge of a right to refuse a search as relevant to a consent finding). Officer Welch's initial, accusatory question, combined with the police-dominated atmosphere, clearly communicated to Mr. Robertson that he was not free to leave or to refuse Officer Welch's request to conduct a search. Mr. Robertson's only options were to submit to the search peacefully or resist violently. Mr. Robertson chose the sensible route. *See United States v. Albrechtsen*, 151 F.3d 951 (9th Cir.1998) ( "[Defendant] was forced to move so that the entering officers would not knock him down. Consent that is not.") (internal quotations omitted).

Further, the police interaction in this case lacks factors that indicate consent. In *United States v. Elie*, involving a search of the defendant's hotel room, we found it highly relevant that the defendant repeatedly asked the police to search and secure

the items in his hotel room. 111 F.3d 1135, 1145 (4th Cir.1997). Similarly, in *Lattimore*, the defendant gave verbal consent and also signed a written consent form after the police officer carefully explained that he wanted to search the defendant's car. 87 F.3d at 649–50. In this case, meanwhile, Mr. Robertson never gave verbal or written consent; he merely surrendered to a police officer's command. Further, in both *Elie* and *Lattimore*, the interactions between the police and the defendants occurred in broad daylight and were characterized by relaxed, friendly conversation between the two sides. *See Elie*, 111 F.3d at 1145 (“nothing in the record indicates an environment that was coercive or intimidating. In fact, *Elie* engaged the officers in friendly conversation”); *Lattimore*, 87 F.3d at 651 (“at no time did the officer use force or a threat of force to coerce *Lattimore*'s consent. In fact, the two men engaged in friendly conversation”). The situation here, meanwhile, lacks those indicia of consent. Officer Welch's initial question was accusatory and was met with cold silence. Officer Welch never received verbal or written consent. Mr. Robertson's behavior was not a clear-eyed, voluntary invitation to be searched; it was a begrudging surrender to Officer Welch's order.

In sum, the facts as presented by Officer Welch are not enough for the government to demonstrate valid consent. Surrounded by police officers, Mr. Robertson watched as every individual in a bus shelter next to him was handled by the police. Soon thereafter, Mr. Robertson was confronted by a police officer who immediately sought to verify whether Mr. Robertson was carrying anything illegal before waving him forward. Given these facts, we are compelled to conclude that the government has failed to meet its burden of demonstrating consent. Accordingly, we reverse the district court's refusal to suppress evidence.

The Court in *Robertson* was dealing with a consent to search rather than a consensual contact, but the rationale remains the same. Though the defendant in this case was not surrounded by police at a bus station, he had been followed home, first in his vehicle, then on foot. The officer began the contact with confrontation. For the Court to find that this was simply consensual contact at 2:00 AM on a man's front lawn would strain both credulity and the protections embodied in Article I § 17 and the Fourth Amendment to their breaking point.

The state goes on to rely on the “driving pattern” exhibited by the defendant to justify the seizure. There was no pattern, however, but simply testimony that the defendant was driving in the “bike lane” at 2:00 AM. Tr. p. 8, L. 22-25, p. 9. L.1. A claim that such driving violates I.C. § 49-637 simply begs the question of whether or not the defendant was in his lane. Lines can be painted on the ground far easier than laws can be passed. One must imagine that bike lanes are driven in rather consistently assuming they run along a lane meant for a car and thus block ingress and egress from the road. Noting simply that the defendant had a few tires on the other side of a line painted in the road at 2:00 in the morning, without more, does not make for a reasonable seizure.

The state also addresses the issue of its alleged ordinance pertaining to “bike lanes.” It is not clear from the state’s refutations of the defendant’s interpretation of various decisions that it actually disagrees with the contention that the court cannot base its ruling on an ordinance that was never provided to the court. Certainly it would be difficult for the court to take judicial notice of something it did not have a copy of. Even now, defense counsel notes that there is no record of what Coeur d’Alene Municipal Code Section 10.40.010 actually says. Thus, even if the state were to be correct that the judicial branch has the power to override a legislative mandate in I.C. § 50-902, it would not change the fact that the record in this case does not support the state’s argument that the officer had reasonable and articulable suspicion, as he trailed after the defendant and stopped him on his lawn, of any law whatever that the defendant had or was breaking.

## II.

The state next argues that there is no evidence to show the breath testing procedure used in this case was not accurate. The state also notes the various articles offered and admits that mouth alcohol is detrimental to the accuracy of breath testing results. The state further relies on Mr. Johnston's testimony that the procedures adopted are able to ensure accuracy, who testified that mouth alcohol is controlled for by a .02 agreement between the two samples taken. And yet, every article provided states that this is not enough. In fact, the state's expert and author of the procedure admitted that his reason for changing that procedure was to protect the result from attacks by defense counsel due to the "subjectivity" of whether a person causes alcohol to return to their mouth. Tr. p. 71, L.18-25, p. 72, L. 1-5. Such a crude understanding of the word subjective hardly seems fitting for a scientific test, and rewriting rules mandated to ensure reliability by the legislature to instead ensure convictions is hardly fitting for a governmental agency.

Moreover, the state contends that the holding in *State v. Besaw*, 155 Idaho 134 (Ct.App.2013) is controlling. To the extent that the Court of Appeals has ruled that to find I.C. §§ 18-8002A and 18-8004 were violated the defense has the burden to prove that the method cannot produce a reliable result, that is true. That ruling was manifestly wrong, both in terms of the burden it created in defiance of the law and on whom it placed that burden, and this Court



may so find, even while constrained by that precedent to follow it.

The state then argues that IDAPA has no application to this case because in *State v. Alford*, 139 Idaho 595, 597 (Ct.App.2004) the Court held that selecting a breath testing device was not a rule. While the state does grasp that the breath testing device and the method for doing breath tests are related to each other, the state seems to have failed to understand that what is being discussed is the promulgation of rules. A breath testing device is very truly not a rule. It is a machine. Adopting a machine is not adopting a rule. The act of adopting is not a rule. A list of standard operating procedures interpreted by courts to dictate whether a breath test is reliable enough to submit to a jury in a court of law, on the other hand, is list of rules.

### III.

Finally, the state contends that the Supreme Court in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), upheld the validity of implied consent laws. The state so much as cites a passage from the opinion in support. However, judicial opinions often contain writing that does not have anything to do with the issues being decided by the court. Those passages are called dictum. See Black's Law Dictionary (9th ed. 2009), dictum. That they are not controlling is well understood by most attorneys. The passage cited by the state is dictum, in that the Supreme Court in *McNeely* was deciding the issue of whether the dissipation of alcohol in the blood was an exigent circumstance obviating the need for judicial review of a decision to draw blood by the executive. Implied consent was not briefed for the court, its constitutionality was not questioned or argued,


and as such, *McNeely* is not controlling on the question of whether implied consent laws pass constitutional muster.

The state's other argument is that actions have consequences and therefore it is no matter that the state has decided to inflict "civil penalties" that amount to a loss of the average Idahoan's main source of transportation for work, pleasure, education, their children's events, etc., and a fine in an amount that perhaps seems trivial to lawyers but is more than enough to intimidate its ever growing indigent population. The Fourth Amendment and its corollary Article I § 17 do not, from the state's perspective, stop the legislature from levying painful punishments on anyone that dares require of a member of the executive the review and consent of the judicial branch. That this is not true seems too obvious to need to be explained. If our rights, these limitations on government power, truly are "sacred civil jewels" for which many men and women in this country have given their lives, the defense cannot accept that they sell for so little. *See State v. Anderson*, 31 Idaho 514 (1918) (Morgan, J., dissenting) (quoting *Underwood v. State*, 13 Ga. App. 206, 78 S. E. 1103 (1913)) *overruled by State v. Arregui*, 44 Idaho 43, 254 P. 788 (1927).

DATED this 22 day of January, 2014.

OFFICE OF THE KOOTENAI  
COUNTY PUBLIC DEFENDER

BY:

  
JAY LOGSDON, ISB 8759  
DEPUTY PUBLIC DEFENDER

### CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I have this 22 day of January, 2014, served a true and correct copy of the attached BRIEF SUPPORTING APPEAL via interoffice mail or as otherwise indicated upon the parties as follows:

Coeur d'Alene Prosecutor FAX 769-2326

Olivia Strange

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

- COURT MINUTES -

John R. Stegner  
District Judge

Date: February 7, 2014

Sheryl L. Engler  
Court Reporter  
Recording: Z: 3/2014-02-07  
Time: 11:30 A.M.

STATE OF IDAHO,	)	
	)	Case No. <b>CR-2013-5363</b>
Plaintiff/Respondent,	)	
	)	<b>Appearances:</b>
vs.	)	
	)	Roy Govey, City Attorney
JESSE CARL RIENDEAU,	)	Appearing on behalf of the State
	)	
Defendant/Appellant.	)	Jay Logsdon, Public Defender
	)	Appearing on behalf of the Defendant

=====

*Subject of Proceedings:* **APPELLATE ARGUMENT by telephone conference**

This being the time fixed pursuant to order of the Court for presentation of appellate argument in this case, Court noted the participation of counsel by telephone conference.

Mr. Logsdon argued on behalf of the appellant. Mr. Govey argued on behalf of the respondent. Mr. Logsdon argued in rebuttal. No surrebuttal.

Court took the matter under advisement, informing counsel that it would render a written decision.

Court recessed at 12:03 P.M.

APPROVED BY:



JOHN R. STEGNER  
DISTRICT JUDGE

Terry Odenborg  
Deputy Clerk

STATE OF IDAHO } ss  
COUNTY OF KOOTENAI  
FILED: 3/27/14

AT 3:34 P M  
CLERK, DISTRICT COURT  
Sue D. Hoffman  
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO, )

Plaintiff-Respondent, )

vs. )

JESSE CARL RIENDEAU, )

Defendant-Appellant. )

Case No. CR-2013-5363

MEMORANDUM OPINION

On March 31, 2013, Jesse Carl Riendeau was charged with misdemeanor Driving Under the Influence in violation of Idaho Code § 18-8004(1)(a). Prior to trial, Magistrate Judge Barry E. Watson denied the defendant's motion to suppress and motion in limine. Riendeau entered a conditional plea of guilty to the charge and appeals from Judge Watson's decision denying his motion to suppress and his motion in limine.

MEMORANDUM OPINION

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## BACKGROUND

At 1:00 A.M. on March 31, 2013, Coeur d'Alene Police Officer Mario Rios was on duty responding to a missing person call. While traveling westbound on Harrison Avenue, Rios observed a vehicle approaching from the opposite direction travel partly in the bicycle lane after cresting a hill. Rios turned around and followed the vehicle, which by that time had made a right hand turn. When Rios caught up with the vehicle, the driver had parked it in a driveway.

Rios parked his patrol car across the street from the driveway (in such a way as to not block the vehicle's exit). At this point, the driver and defendant in this case, Jesse Riendeau, exited his vehicle and approached Rios. Riendeau was holding a package of food, and Rios observed that he seemed clumsy and slow, and was slurring his speech. Rios did not observe glassy or bloodshot eyes. Rios observed that Riendeau was wearing an "overwhelming cologne," but did not note the odor of alcohol.

Approximately two minutes into his encounter with Riendeau, Rios asked for the defendant's driver's license, which was surrendered at that time. Riendeau denied the consumption of alcohol or drugs prior to driving. Nevertheless, Rios asked Riendeau to submit to field sobriety testing. Riendeau complied with the request. Riendeau performed unsatisfactorily on the tests, and Rios arrested him for DUI, providing him with an ALS advisory form explaining the consequences of refusing to submit to evidentiary testing. A subsequent breath test, in compliance

with the Standard Operating Procedures (SOPs) promulgated by the Idaho State Police, revealed breath alcohol concentration in excess of the statutory limit (0.17 and 0.18).

The defense moved to suppress the breath test on two grounds: first, that the seizure of Riendeau at the time of the request for his license was unlawful because it was not supported by reasonable articulable suspicion; and second, that Riendeau's consent to the breath test was constitutionally invalid because it did not apprise him of the criminal consequences of taking and failing the BAC test. The defense also filed a motion in limine to exclude the breath test from trial on the grounds that the SOPs for breath testing adopted by the Idaho State Police are so deficient as to provide no standard for the scientific reliability of alcohol concentration evidence.

The magistrate judge determined that Riendeau was seized at the time that Rios requested the field sobriety tests, and that Rios had a reasonable articulable suspicion that Riendeau was driving under the influence at that point. Thus, there was no illegal seizure of Riendeau. The magistrate judge also determined that Riendeau's consent was constitutionally valid. Finally, the magistrate judge ruled that the SOPs promulgated by the Idaho State Police ensure the scientific accuracy of the breath testing conducted in DUI investigations. As a result, the magistrate judge denied all of the defendant's motions. The defendant entered a conditional guilty plea and this appeal follows.

## ANALYSIS

A trial court's ruling on a motion to suppress is reviewed on a bifurcated standard. *State v. Wheeler*, 149 Idaho 364, 233 P.3d 1286 (Ct. App. 2010). Findings of fact supported by substantial evidence are accepted, but the reviewing court considers the application of constitutional principles *de novo*. *Id.*, 149 Idaho at 370, 233 P.3d at 1292. For the motion in limine, an appellate court exercises free review over a question of law. *State v. Button*, 134 Idaho 814 (Ct. App. 2000).

The Fourth Amendment of the U.S. Constitution provides that the right to be secure from unreasonable searches and seizures shall not be violated, and that no warrants shall be issued except upon a showing of probable cause. U.S. CONST. AMEND. IV. Article I, § 17 of the Idaho Constitution provides similar, although some would argue greater, protection against unreasonable searches.

In Idaho, a seizure for investigative purposes must be based upon reasonable suspicion, derived from specific articulable facts that the person stopped has committed or is about to commit a crime. *State v. Salato*, 137 Idaho 260, 264, 47 P.3d 763, 767 (Ct. App. 2001). The reasonableness of a seizure is determined by the totality of the circumstances confronting the officer at the time. *Id.*, 137 Idaho at 265, 47 P.3d at 768.

The request for a driver's license may be a seizure. *See State v. Osborne*, 121 Idaho 520, 524, 826 P.2d 481, 485 (Ct. App. 1991). In *Osborne*, the Court of Appeals determined that the request for a driver's license was a seizure because a



person in control of a vehicle is required by law to surrender his driver's license to law enforcement. I.C. § 49-316. Under these circumstances, the Court of Appeals determined that the defendant "could not reasonably have believed he was 'at liberty to ignore the police presence and go about his business.'" *Id.* Nevertheless, in another situation, the Idaho Supreme Court has found the request for identification is not a seizure. *State v. Nickel*, 134 Idaho 610, 613, 7 P.3d 219, 222 (2000) (no seizure occurred where officer took possession of an expired driving permit that would not allow defendant to travel upon public highways).

In other situations, the show of authority and intimidation may be sufficient to constitute a seizure. *State v. Liechty*, 152 Idaho 163, 168, 267 P.3d 1278, 1283 (Ct. App. 2011). Actions constituting a seizure can include display of a weapon, physical touching by the officer, or even the use of language or tone of voice that indicates compliance with the officer's request is compelled. *Id.* (quoting *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980)). However, the critical inquiry is whether a reasonable person would feel free to disregard the police officer, and decline the officer's request, or otherwise terminate the encounter. *Id.*

Observations of slurred speech, odor of alcohol, and an admission to consuming alcohol can justify a seizure for DUI. *State v. Pick*, 124 Idaho 601, 605, 861 P.2d 1266, 1270 (Ct. App. 1993). Bloodshot and dilated eyes can also be a contributing justifying factor, though bloodshot eyes alone are not enough to establish reasonable suspicion. *State v. Grigg*, 149 Idaho 361, 364, 233 P.3d 1283,

1286 (Ct. App. 2010). Erratic driving behavior may also give rise to reasonable suspicion required for a seizure. *State v. Martinez-Gomez*, 152 Idaho 775, 780, 275 P.3d 1, 6 (Ct. App. 2012).

Consent is a well-recognized exception to the Fourth Amendment requirement for a search warrant. *Wheeler*, 149 Idaho at 370, 233 P.3d at 1292. Under Idaho Code § 18-8002(1), every operator of a motor vehicle in the state of Idaho is deemed to have given consent to evidentiary testing for alcohol concentration.<sup>1</sup> This is commonly referred to as implied consent. Among other provisions, the implied consent statute authorizes the imposition of a \$250 penalty and the suspension of one's driving privileges for one year for refusal to submit to testing. I.C. § 18-8002. Both the penalty and the loss of driving privileges are characterized as *civil* remedies. A driver may also be shown to freely and voluntarily consent to an evidentiary test, such as a breath test, in light of all the circumstances. *State v. Varie*, 135 Idaho 848, 852, 26 P.3d 31, 35 (2001).

As an initial matter, both parties agree that Riendeau was seized at the time that Rios asked for his driver's license, and that the magistrate judge erred in determining that the seizure occurred when the officer requested the field sobriety

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<sup>1</sup> I.C. § 18-8002(1) states:

Any person who drives or is in physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol as defined in section 18-8004, Idaho Code, and to have given his consent to evidentiary testing for the presence of drugs or other intoxicating substances, provided that such testing is administered at the request of a peace officer having reasonable grounds to believe that person has been driving or in actual physical control of a motor vehicle in violation of the provisions of section 18-8004, Idaho Code, or section 18-8006, Idaho Code.

tests. However, it appears that when Riendeau surrendered his license he was no longer in his vehicle, making *Osborne* inapplicable here. Upon the facts of the case, it is unimportant to determine precisely when Riendeau was seized. What is important is that he was seized thereby triggering a constitutional analysis of the propriety of the seizure.

As for justifying the seizure, Rios was aware of several things that contributed toward a finding of reasonable articulable suspicion. First, Rios observed Riendeau's vehicle traveling partly in the bicycle lane late at night. As the State correctly notes, even if this is not a violation of state driving statutes, it is a violation of the Coeur d'Alene municipal code. Coeur d'Alene Municipal Code § 10.40.010. The defense urges that this ordinance was not properly produced, and that it cannot be judicially noticed. However, this Court may take judicial notice of a municipal ordinance where it is not subject to reasonable dispute because it is either generally known within the territorial jurisdiction of the trial court, or capable of accurate and ready determination. *State v. Doe*, 146 Idaho 386, 387, 195 P.3d 745, 746 (Ct. App. 2008). The defendant's arguments against considering the municipal ordinance are inapposite; Rios could properly conclude that Riendeau was violating the ordinance against driving in the bicycle lane.

Even if driving in the bicycle lane were not a violation of the law, it still may be classified as erratic driving behavior that contributed to reasonable suspicion. In conjunction with the other facts, it supports the expansion of the consensual

encounter to field sobriety testing, along with observations of Riendeau during the consensual contact: slurred speech and a lack of coordination. This Court cannot conclude that the magistrate judge erred in finding reasonable suspicion. There are articulable facts to justify the seizure under the totality of the circumstances test.

The defendant argues that the magistrate judge also erred in denying the motion in limine. The defendant suggests that the standards for breath testing procedure established by the Idaho State Police are so deficient that they constitute no standard at all, and therefore the results must be excluded. Over the years, the Idaho State Police have amended the SOPs to be less stringent. In some cases the Idaho State Police have relaxed some testing procedures from regulations saying an officer “must” do something to saying that an officer “should” do something. *Wheeler v. Idaho Transp. Dept.*, 148 Idaho 378, 223 P.3d 761 (Ct. App. 2009). In *Wheeler*, the Court of Appeals determined that these amendments did not eliminate the standards required for testing, since it could not be demonstrated that the tests conducted were unreliable. *Id.*, 148 Idaho at 386, 223 P.3d at 769. Judge Lansing dissented, arguing that a “should” standard is merely a recommendation, and in truth, no standard at all. *Id.*, 148 Idaho at 388, 223 P.3d at 771. The defendant relies heavily on the *Wheeler* dissent to argue that the Idaho State Police have abrogated their responsibility to create reliable standards for breath testing.

However, Judge Lansing's dissent is nothing more than that: a dissent. Its value has been further undermined by the majority opinion in *State v. Besaw*, 155 Idaho 134, 306 P.3d 219 (Ct. App. 2013) (not yet paginated in Idaho Reporter). In *Besaw*, the Court of Appeals rejected the notion that the SOPs were "incapable of yielding accurate tests." *Id.*, 155 Idaho \_\_\_, 306 P.3d at 229. In discussing the *Wheeler* dissent, Judge Lansing herself, writing for the majority, indicated that it was not authoritative enough to challenge the principle of *stare decisis*. *Id.* In light of the fact that the author of the *Wheeler* dissent places no value in it, the defendant's reliance on it is misplaced.

The defendant further argues that the SOPs should be subject to the rulemaking regulations of the Idaho Administrative Procedures Act (IDAPA). He argues that failure to follow the rule-making requirements of IDAPA invalidates the SOPs. In response, the State argues the applicability of *State v. Alford*, 139 Idaho 595, 83 P.3d 139 (Ct. App. 2004). In *Alford*, the Court of Appeals reviewed the approval by the Idaho State Police of the Alco-Sensor III as a testing device for breath alcohol concentration. *Id.*, 139 Idaho at 597, 83 P.3d at 141. The Court of Appeals concluded that IDAPA, "does not apply when the Idaho state police approves the methods for determining an individual's alcohol concentration." *Id.* The Court of Appeals utilized the analysis of *Asarco Inc. v. State*, 138 Idaho 719, 69 P.3d 139 (2003) in coming to that conclusion; *Asarco* is the same case that the defense here attempts to utilize to show that the SOPs are subject to IDAPA.

It should be noted that in *Besaw*, the Court of Appeals did recognize that there is “troubling information about the manner in which the SOPs for breath testing have been developed or amended . . .” *Besaw*, 155 Idaho \_\_\_, 306 P.3d at 229. However, as was noted in *Besaw*, the defendant here has not alleged that the SOPs were not followed, or that there is any objective evidence that the breath test conducted was somehow unreliable. *See Besaw*, 155 Idaho \_\_\_, 306 P.3d at 229 n. 6. While there is some concern over the methods by which the Idaho State Police amends the SOPs, the Court of Appeals has countenanced that process. While Riendeau may be unable to challenge the breath test’s admissibility, he still had the opportunity at trial to attack the scientific reliability of the results. *See Wheeler*, 148 Idaho at 386, 223 P.3d at 769 “[W]e conclude that the violation of a regulation requiring that a procedure ‘should’ be followed . . . opens the door for the driver to attack the evidentiary test result through expert testimony or other evidence tending to prove that the violation rendered the result unreliable.”

Finally the defendant argues that his consent was unconstitutional because he was coerced by the penalties listed on the ALS advisory form that was presented by Rios. The ALS advisory recites to a driver, among other things, “You are required by law to take one or more evidentiary test(s) to determine the concentration of alcohol or presence of drugs or other intoxicating substances in your body.” Then follows a list of *civil* penalties that may be imposed against the driver for refusal to undergo testing. Riendeau argues that *Missouri v. McNeely*,

133 S. Ct. 1552 (2013) requires a different analysis of what warning is required regarding his criminal case. Riendeau seems to argue that because the implied consent advisory does not list the criminal implications of taking the test and failing it, that it cannot be considered a knowing, intelligent, and voluntary waiver for criminal purposes.

In *McNeely*, the U.S. Supreme Court noted that:

States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. . . .

The *McNeely* Court also cited *South Dakota v. Neville*, 459 U.S. 553 (1983).

In *Neville*, the U.S. Supreme Court reviewed certain aspects of South Dakota's implied consent law. *Id.* The Supreme Court found that the law allowed a one-year revocation of a driver's license for refusal to allow testing after the driver was given an opportunity for a hearing. *Id.*, 459 U.S. at 560. The Supreme Court then stated succinctly: "Such penalty for refusing to take blood-alcohol test is unquestionably legitimate, assuming appropriate procedural protections." *Id.* The U.S. Supreme Court further stated in a footnote:

Even though the officers did not specifically advise respondent that the test results could be used against him in court, no one would seriously contend that his failure to warn would make the test results inadmissible, had respondent chosen to submit to the test. . . .

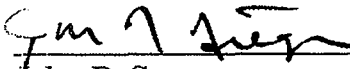
While the State did not actually warn respondent that the test results could be used against him, we hold that such a failure to warn was not the sort of implicit promise to forego use of evidence that would unfairly "trick" respondent if the evidence were later offered against him at trial. . . .

*Id.*, 459 U.S. at 565 n. 16, 566.

Given that *McNeely* specifically references *Neville*, it does not require the invalidation of the consent to breath test. This Court is troubled by the advisory warning's failure to mention that the breath test administered is contemplated for use in *criminal* prosecution. Were it not for the controlling precedent of *South Dakota v. Neville*, this Court would find that Riendeau's consent was invalidated by a failure to warn him of the *criminal* consequences of taking and failing the breath test. However, this Court is constrained by the decision of the United States Supreme Court in *Neville*, where the justices determined that officers need not specifically warn a driver that alcohol test results may be used against him in a criminal trial. *Neville*, 459 U.S. at 566–67. Reluctantly, this Court must conclude that Riendeau's consent was valid, and the breath test was justified on that basis.

As a result, the decision of the magistrate judge, denying the defendant's motions to suppress is AFFIRMED.

Dated this 7<sup>th</sup> day of March 2014.

  
\_\_\_\_\_  
John R. Stegner  
District Judge



## CERTIFICATE OF SERVICE

I do hereby certify that full, true, complete, and correct copies of the foregoing order were delivered to:

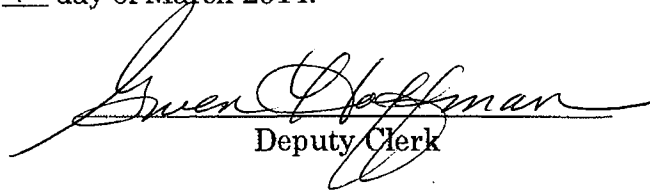
Roy Govey  
Deputy Prosecuting Attorney  
710 E. Mullan Ave.  
Coeur d'Alene, ID 83814

☐ U.S. Mail  
☐ Overnight Mail  
☒ Fax ~ 769-2324  
☐ Hand Delivery

Jay Logsdon  
Deputy Public Defender  
400 Northwest Blvd.  
Coeur d'Alene, ID 83814

☐ U.S. Mail  
☐ Overnight Mail  
☒ Fax ~ 1701  
☐ Hand Delivery

On this 7 day of March 2014.

  
Deputy Clerk

ORIGINAL

Jay Logsdon, Deputy Public Defender  
Office of the Kootenai County Public Defender  
PO Box 9000  
Coeur d'Alene, Idaho 83816  
Phone: (208) 446-1700; Fax: (208) 446-1701  
Bar Number: 8759

STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED:

2014 MAR 11 PM 2:50

CLERK DISTRICT COURT  
*Cindy O'Belly*  
DEPUTY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)		
	)	CASE NUMBER	CR-13-0005363
Plaintiff,	)		Misd
	)		
V.	)	NOTICE OF APPEAL	
	)		
JESSE CARL RIENDEAU,	)		
	)		
	)		
Defendant.	)		

TO: THE ABOVE NAMED RESPONDENT, STATE OF IDAHO, AND THE CLERK OF  
THE ABOVE ENTITLED COURT:

1. The above named Appellant hereby appeals against the above named Respondent, the State of Idaho, to the Supreme Court of the State of Idaho, the Memorandum Opinion sustaining the Judgment and Sentence entered in the Magistrate's Division of First District Court in the above entitled matter on or about March 7, 2014, the Honorable John Stegner, District Judge, presiding. The Memorandum Opinion affirmed the Judgment and Sentenced entered in this matter on August 8, 2013, the Honorable Barry Watson, Magistrate, presiding. Said Judgment and Sentence are based on the Conditional Guilty Plea entered pursuant to I.C.R. 11(a)(2) on June 21, 2013.

2. That the party has a right to appeal to the Kootenai County District Court, and the judgment described in paragraph one above is an appealable order under and pursuant to Idaho Appellate Rule 11(c)(10).

3. That this appeal is taken upon matters of law and fact.

4. A preliminary statement of the issues on appeal, which the appellant then intends to assert in the appeal, provided any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal, is/are:

(a) Whether Idaho State Police have adopted rules for the administration of breath alcohol testing as required by I.C. §§ 18-8004 and 18-8002A.

(b) Whether the changes to the Standard Operating Procedures for the administration of breath alcohol testing have so weakened the credibility and scientific accuracy of those procedures as to render them a nullity.

(c) Whether Idaho's implied consent law violates the Fourth Amendment to the United States Constitution and Article I § 17 of the Idaho Constitution.

5. A portion of the record is sealed, that portion being the substance abuse evaluation.

6. **Reporter's Transcript.** A reporter's transcript of the motions hearings on May 10, 2013, May 20, 2013, and May 24, 2013, has already been prepared. The appellant would request that they be included in the record for this appeal. Appellant requests the preparation of the entire reporter's transcript of the oral argument held telephonically before the District Judge on February 7, 2014, pursuant to Idaho Appellate Rule 25(b). A page estimate was not included in the register of actions.

7. **Clerk's Record.** The appellant requests the standard clerk's record pursuant to I.A.R. 28(b)(2). The appellant requests the following documents to be included in the clerk's record, in addition to those automatically included under I.A.R. 28(b)(2):

(a) Any exhibits.

(b) A copy of the defendant's Supplemental Material for Motion in Limine and Motion for Judicial Notice and attachments including copies of the standard operating procedures and manual.

7. I certify:

(a) A copy of this Notice of Appeal has been served upon all court reporters from whom a transcript is requested. The name and address of each such reporter is marked below in the Certificate of Service;

(b) That the appellant is exempt from paying the estimated fee for the preparation of the record because the appellant is indigent. (Idaho Code § 31-3220, 31-3220A, I.A.R. 24(e));

(c) That there is no appellate filing fee sine this is an appeal in a criminal case (Idaho Code § 31-3220, 31-3220A, I.A.R. 24(e)(8));

(d) That arrangements have been made with Kootenai County who will be responsible for paying for the reporter's transcript, as the client is indigent, Idaho Code § 31-3220, 31-3220A, I.A.R. 24(e);

(e) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 11 day of March, 2014.

THE LAW OFFICE OF THE PUBLIC  
DEFENDER OF KOOTENAI COUNTY

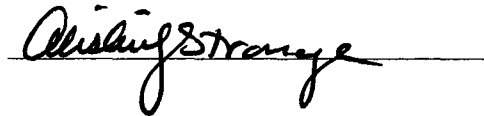
BY:

  
\_\_\_\_\_  
JAY LOGSDON  
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11 day of March, 2014, served a true and correct copy of the attached NOTICE OF APPEAL via interoffice mail or as otherwise indicated upon the parties as follows:

<u>X</u>	City of Coeur d'Alene Prosecutor 710 E. Mullan Ave. Coeur d'Alene, Idaho 83814	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Facsimile (208) 769-2326
<u>X</u>	Lawrence G. Wasden Attorney General P.O. Box 83720 Boise, Idaho 83720-0010	<input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Facsimile (208) 854-8071
<u>✓</u>	Court Reporter Sheryl Engler via Facsimile (866) 770-0213	



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,  
Plaintiff/Respondent

) SUPREME COURT  
) CASE NUMBER  
) 41982  
)

vs.

) CLERK'S CERTIFICATE  
)  
)

JESSE CARL RIENDEAU  
Defendant/Appellant

I CINDY O'REILLY Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the foregoing Record in this cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents requested by Appellate Rule 28.

I further certify that the following will be submitted as exhibits to this Record on Appeal:

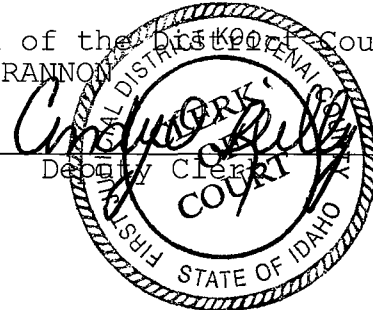
EVALUATION LEGACY HOUSE FILED  
DEFENDANT'S EXHIBIT (A 18-8002)  
PLAINTIFF'S EXHIBIT (1,2 & 3 DVD'S)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 14<sup>TH</sup> day of MAY 2014.

Clerk of the District Court  
JIM BRANNON

By: \_\_\_\_\_

Deputy Clerk



Clerk's Certificate

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

State of Idaho )  
Plaintiff/Respondent )  
)  
)  
)  
VS )  
)  
)  
)  
JESSE CARL RIENDEAU )  
Defendant/Appellant )

SUPREME COURT # 41982

CASE #CRF13-5363

CERTIFICATE OF SERVICE

I, Cindy O'Reilly, Deputy Clerk of the District Court of the First Judicial District  
Of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have  
personally served or mailed, by United States Mail, one copy of Clerk's Record to  
each of the attorneys of record in this cause as follows:

Jay Logsdon  
Public Defender  
PO Box 9000  
Coeur d'Alene, ID 83816

Mr. Lawrence Wasden  
Attorney General  
State of Idaho  
700 W. Jefferson  
Suite 210  
Boise ID 83720-0010

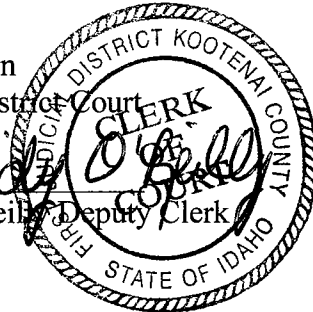
Attorney for Appellant

Attorney for Respondent

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of  
Said Court this 14<sup>TH</sup> day of MAY, 2014.

Jim Brannon  
Clerk of District Court

By *Cindy O'Reilly*  
Cindy O'Reilly, Deputy Clerk



CERTIFICATE OF SERVICE

ORIGINAL

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO }  
COUNTY OF KOOTENAI } SS  
FILED: 9-24-13  
AT 2:05 O'CLOCK P.M.

CLERK, DISTRICT COURT  
*Christine Campbell*  
DEPUTY

STATE OF IDAHO,  
Plaintiff,  
VS.  
JESSE CARL RIENDEAU,  
Defendant.

CASE NO. CR 2013-5363

TRANSCRIPT:

Motion Hearings

AT: Coeur d'Alene, Kootenai County, Idaho  
ON: May 10, 2013; May 20, 2013; May 24, 2013  
BEFORE: Honorable Barry Watson, Magistrate Judge

APPEARANCES:

For the Plaintiff: David Judd  
Roy Gowey  
Deputy Coeur d'Alene Prosecutors  
816 Sherman Avenue, Ste. 4  
Coeur d'Alene, Idaho 81816-0489

For the Defendant: Jay Logsdon  
Meghan Marshall  
Deputy Public Defenders  
400 Northwest Boulevard  
Coeur d'Alene, Idaho 83814



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1 (Motions Hearing on May 10, 2013)

2 THE COURT: How's that pronounced again?

3 UNIDENTIFIED MALE VOICE: Riendeau.

4 THE COURT: Riendeau, okay. So Riendeau. It's a  
5 little different. 2013-5363. Mr. Judd, are you ready to  
6 go on this?

7 MR. JUDD: We are, your Honor.

8 MR. LOGSDON: Yes, sir.

9 THE COURT: Okay. So we got -- Now, it's a motion  
10 in limine, is that right? It's not a motion to suppress?

11 MR. LOGSDON: We have two motions to suppress and a  
12 motion in limine. We'd start with the motion to  
13 suppress, your Honor.

14 THE COURT: Oh, there's several motions. Okay. And  
15 what is the scope of your motions?

16 MR. LOGSDON: Uh, we have a motion to suppress the  
17 stop --

18 THE COURT: Stop.

19 MR. LOGSDON: -- and a motion to suppress the breath  
20 test results.

21 THE COURT: Oh, and the breath test results. Okay.  
22 All right. And uh, this was a warrantless situation,  
23 Mr. Judd?

24 MR. JUDD: Yes, your Honor.

25 THE COURT: So you -- you have the burden of going

1 forward. How would you like to proceed.

2 MR. JUDD: The State would stipulate to that. First  
3 I think we have some preliminary issues that we could  
4 probably address, maybe lock down the issues here.  
5 First, I have three videos that were provided to the  
6 defense attorney. I don't know if he would stipulate to  
7 those today.

8 MR. LOGSDON: Yeah.

9 MR. JUDD: Admission of those.

10 THE COURT: So we've got three --

11 MR. LOGSDON: For the purposes of this hearing,  
12 obviously, your Honor, not for the trial.

13 THE COURT: -- three videos. So we would mark those  
14 Plaintiff's 1, 2, and 3, and it would just --

15 MR. JUDD: May I approach?

16 THE COURT: Yeah. And that would just be for this  
17 hearing.

18 MR. JUDD: Yes, your Honor.

19 THE COURT: No objection?

20 MR. LOGSDON: No, your Honor, although I -- I think  
21 since we're only attacking the stop of the vehicle and  
22 then uh, the uh, taking of the breath test, I'm not so  
23 sure that a lot of that really needs to be played, and  
24 I --

25 MR. JUDD: Agreed.

1 MR. LOGSDON: -- don't really wanna be here all day.  
2 MR. JUDD: Agreed.  
3 MR. LOGSDON: Thank you.  
4 THE COURT: Okay.  
5 MR. JUDD: There's probably a two-minute portion of  
6 the first video and then the -- from the State's  
7 perspective, the VIEVU video doesn't need to be played at  
8 all, the body camera video, um, which was on the scene.  
9 However, there's a separate --  
10 THE COURT: which one -- which number is the body --  
11 THE CLERK: 1 is the jail.  
12 THE COURT: 1 is --  
13 MR. JUDD: The jail video would be the video that we  
14 would be playing. That would be the most relevant to  
15 today.  
16 THE CLERK: 2 is the car.  
17 THE COURT: 1 is the jail, 2 is the car.  
18 THE CLERK: Oh, but I got two videos in -- in one  
19 package.  
20 MR. JUDD: Yeah.  
21 THE COURT: Oh-oh.  
22 MR. JUDD: The non-marked video is the -- Or  
23 actually they're all marked.  
24 THE CLERK: This one says V --  
25 THE COURT: VIEVU?

1 THE CLERK: Okay.

2 THE COURT: So that's the body deal.

3 MR. JUDD: And that could -- Yeah.

4 THE COURT: All right. So would that be 3, I guess?

5 THE CLERK: And that'll be 3, and I'll put a  
6 (inaudible)...

7 THE COURT: VIEVU. And so -- I mean we're admitting  
8 that, but it's not really of any relevance to what we're  
9 doin', is that right?

10 MR. LOGSDON: Apparently, your Honor.

11 MR. JUDD: Not that I'm aware of, your Honor.

12 THE COURT: Okay.

13 MR. LOGSDON: I'm not gonna object, but --

14 THE COURT: Okay. Well, it's admitted but it  
15 doesn't sound like it has any relevance. So it's just 1  
16 and 2 are the main ones. Okay?

17 (Plaintiff's Exhibits 1, 2, and 3 - Admitted)

18 THE COURT: Any other preliminary issues?  
19 Stipulations, agreements (inaudible)...

20 MR. JUDD: Regarding the motions to suppress, no,  
21 your Honor.

22 THE COURT: Okay. Do you have a witness you would  
23 like to call?

24 MR. JUDD: State would call Officer Mario Rios.

25 THE COURT: All right. Officer Rios, if you could

1 step forward, raise your right hand and be sworn.

2 MARIO RIOS

3 was called as a witness on behalf of the Plaintiff,  
4 having been duly sworn, testified as follows to-wit:

5 THE COURT: All right. Pull up a chair.

6 THE WITNESS: Thank you, your Honor.

7 THE COURT: I think your mic's on there. Yeah.

8 MR. JUDD: And your Honor, going forward I think  
9 we're gonna have another stipulation as far as Mr. Rios's  
10 training and experience, that he's POST certified in the  
11 state, so forth for today's hearing.

12 THE COURT: Do we? I'm not hearin' one, so.

13 MR. LOGSDON: Uh, no.

14 MR. JUDD: Okay. All right.

15 THE COURT: Go ahead.

16 DIRECT EXAMINATION

17 BY MR. JUDD:

18 Q. Please state your name and spell uh -- spell  
19 that for the Court.

20 A. Mario Rios, R-i-o-s.

21 Q. And what do you do, Mr. Rios?

22 A. I'm a patrol officer for the City of  
23 Coeur d'Alene.

24 Q. How long have you done that?

25 A. Approximately 12 years.

1 Q. Okay. What training and education did you  
2 receive to become a patrol officer?

3 A. Initially received uh, reserve academy training.  
4 I was a reserve officer for Coeur d'Alene PD for a few  
5 months. Before going to uh, be hired full time I  
6 attended the POST, Peace Officer's Standards and Training  
7 Academy down in uh, Meridian, Idaho back in 2001.

8 Q. And are you -- Did you successfully complete  
9 that?

10 A. I did.

11 Q. And are you POST certified in the state of  
12 Idaho?

13 A. I am.

14 Q. And have you received any training and  
15 experience pertaining to driving under the influence  
16 evaluations?

17 A. Yes, I have.

18 Q. And what is that?

19 A. Again the reserve academy in 2001 as well as the  
20 POST certification, and as well as refresher courses that  
21 uh, have been through in-service trainings at the  
22 Coeur d'Alene Police Department.

23 Q. Did you successfully complete all that training?

24 A. Yes, I have.

25 Q. What are your obligations as a patrol officer?

1           A. Obligations as a patrol officer are handling  
2 calls for service, whether they're cold or in-progress  
3 calls, also traffic stops (inaudible)... emphasis.

4           Q. And as part of your job description as a patrol  
5 officer do you regularly investigate DUIs, or driving  
6 under the influence cases?

7           A. Yes.

8           Q. And again you're trained to do that?

9           A. That's correct.

10          Q. Do you in fact perform those on a regular basis?

11          A. I work the graveyard shift, so, yes, I do.

12          Q. Okay. And so then as part of your job as a  
13 patrol officer do you also monitor traffic?

14          A. Yes.

15          Q. And what does that entail?

16          A. Uh, that entails anything from your basic rule  
17 infractions such as stop signs, speeding, red light, lane  
18 violations and so forth.

19          Q. And have you successfully completed that  
20 training?

21          A. Yes.

22          Q. And turning to the incident here, were you on  
23 duty on March 31<sup>st</sup> of this year, 2013?

24          A. Yes, I was.

25          Q. And were you on duty at approximately 1:00 a.m.



1 that morning?

2 A. Yes, I was.

3 Q. And what were you doing?

4 A. I was uh -- I believe I had -- about 1:00 in the  
5 morning I had just left the um, Public Safety Building or  
6 somewhere in that area. I was heading to respond to a  
7 missing person's call.

8 Q. Okay. Did you end up on Harrison Avenue or  
9 Harrison -- Is it Harrison Avenue? Did you end up on  
10 Harrison?

11 A. Yes, I did.

12 Q. In the city of Coeur d'Alene, Kootenai County,  
13 Idaho?

14 A. That's correct. Yes, I did.

15 Q. And uh, which direction were you driving on  
16 Harrison?

17 A. I was driving westbound on Harrison.

18 Q. Okay. While you drove westbound on Harrison did  
19 a vehicle catch your attention?

20 A. Yes.

21 Q. And why was that?

22 A. I was headed in the westbound direction; a  
23 vehicle approaching me as I was comin' up to the crest of  
24 the hill uh, was coming down. The vehicle was traveling  
25 all the way to the right of the roadway in the bike lane,

1 um, traveling eastbound on Harrison.

2 Q. Okay. And when you first observed that vehicle,  
3 how far away uh, was it from you roughly?

4 A. Probably 50 yards. As I said, it was right at  
5 the crest of the hill. They were come -- That vehicle  
6 was comin' down, I was goin' up the hill.

7 A. Okay. And you stated that the vehicle was in a  
8 bike lane. Could you please describe what you mean by  
9 that, what bike lane?

10 A. On those particular lanes, the eastbound lane,  
11 there's a uh, divided lane with a white line. There's a  
12 lane approximately two or three feet wide, probably about  
13 the width of this desk right in here uh, that is on the  
14 far south side of the road.

15 Q. Okay. And uh, so is this -- Harrison, is this a  
16 marked street?

17 A. It is.

18 Q. Is it marked with a center dividing line?

19 A. I believe so.

20 Q. Okay. And then there's a -- Is there a white  
21 line on each side of the road?

22 A. I'm right now only aware of the eastbound lanes  
23 on the south side.

24 Q. Okay. And is there a white line on the  
25 eastbound side?

1 A. There is.

2 Q. Okay. And now this vehicle that you saw, when  
3 you saw it was it over that white line?

4 A. Yes, it was.

5 Q. And when you say over the white line, how far  
6 over?

7 A. It was completely over the white line uh, near  
8 the curb line actually. There's uh, a -- approximately a  
9 six-inch curb on that side of the road and it was near  
10 the curb.

11 Q. So uh, what uh -- what -- I guess what --  
12 Looking at the vehicle from a cross section, was it in  
13 the middle? Was the white line in the middle of the  
14 vehicle, a few feet in on the vehicle? How far?

15 A. A few feet in. I don't believe the lane's wide  
16 enough for it to go all the way to the middle of the  
17 vehicle but it was as far as it could go without the  
18 vehicle goin' on the curb.

19 Q. Okay. And how long did you see this vehicle  
20 travel over that white line?

21 A. Uh, one to two seconds at the most.

22 Q. Okay. Can you estimate how many feet that would  
23 be?

24 A. I could not. I would estimate probably 50 feet.

25 Q. Okay. So what did you do next?

1           A. At that -- At that time I was able to pull to  
2 the north side of the road on the right shoulder from my  
3 lanes, flip back around and went to locate the vehicle  
4 that had just passed me.

5           Q. Okay. When you turned around, where was the  
6 vehicle?

7           A. When I turned around the vehicle was turning  
8 southbound on 10<sup>th</sup> Street, which is on the other side of a  
9 park.

10          Q. So is that a right turn?

11          A. That's a right-hand turn, so it would have gone  
12 southbound.

13          Q. What were the uh, conditions at this time?

14          A. They were clear. Uh, I don't --

15          Q. Was the road -- was anything covering the road?

16          A. No, I don't believe so.

17          Q. Or any of the lines?

18          A. Roads were clear, there was -- I don't believe  
19 it was raining or anything.

20          Q. Okay. So no latent -- no snow that was hanging  
21 out on the road or anything like that?

22          A. No, sir.

23          Q. Is that bike lane, do you know if that's marked  
24 by signs?

25          A. I know it's a school zone, but I don't know if

1 that particular lane is marked.

2 Q. Okay. So you turned around, um, you had saw the  
3 vehicle turn, what happened next?

4 A. Uh, I was able to catch up to the vehicle. I  
5 turned southbound on 10<sup>th</sup> Street just as uh, the vehicle  
6 was stopped and the driver was exiting the vehicle.

7 Q. Okay. And did you turn on your patrol lights?

8 A. I don't believe I did.

9 Q. Did you block that vehicle in?

10 A. No. I pulled over to the um, curb that's on the  
11 east side just right in front of the residence. I was  
12 actually uh, going opposite direction of the traffic. I  
13 was southbound in the northbound lanes.

14 Q. Did you see the driver of the vehicle?

15 A. I did.

16 Q. And how did you see him or what did you see?

17 A. He was steppin' out of the vehicle. He was  
18 approaching me. Um, he had some food in his hands, uh, a  
19 bag of sandwiches or somethin'. He was kinda talkin' to  
20 me, somethin' to the effect of "Come on, man," or  
21 somethin' of that nature.

22 Q. Okay. Did you tell him why you were contacting  
23 him?

24 A. I did.

25 Q. And what did you tell him?

1           A. I told him I was contacting him because of the  
2 violation uh, that I had seen on Harrison.

3           Q. Okay. Did you uh, notice anything about his  
4 appearance, unusual?

5           A. He was -- He was very slow in his reaction. Uh,  
6 his speech was slurred. Um, and he was uh, fiddling with  
7 his food uh, and it was -- he was almost clumsy with the  
8 way he was movin' with his food. And he was tryin' to  
9 address the fact that I was more contacting him in front  
10 of his residence than uh, the violation.

11          Q. Okay. Did he talk to you at all about driving  
12 in the bike lane?

13          A. I don't recall.

14          Q. Okay. Did um -- what did you do next?

15          A. At that time I talked to him about his driving.  
16 Uh, based on the movements that I saw uh, from his body,  
17 his slow, lethargic movements, his impaired speech, uh,  
18 as well as the driving violation, I recognized those to  
19 be signs of uh, driving under the influence. I talked to  
20 him about drinking. I had asked him if he'd consumed any  
21 alcohol in the night. He said he had not.

22          Q. Okay.

23          A. Um, I then asked him if he had had any illegal  
24 drugs or any prescription drugs and he said he had not.

25          Q. Okay. I'm gonna back up a little bit back to

1 the -- the driving that you observed. When uh, you saw  
2 the vehicle driving over that white line, how close to  
3 the intersection where the vehicle turned was that  
4 vehicle at that point?

5 A. It was uh, probably about 100 feet or so.  
6 There's a full length of park just as you're coming down  
7 the vehicle (sic) and there's a park on the south side of  
8 the road. So it was a bit of distance between where I  
9 saw the violation and the southbound turn on 10<sup>th</sup> Street.

10 Q. Okay. And um -- Okay. You noticed the  
11 indicators that you thought he may be under the  
12 influence. Did you conduct a DUI investigation?

13 A. I did.

14 Q. And exact -- To clarify, why exactly did you do  
15 that?

16 A. Uh, based on again my observations. Uh, the  
17 lethargic movements, the slurred speech, and the driving  
18 pattern that I had seen.

19 Q. Okay. Are you trained to conduct DUI  
20 investigations?

21 A. I am.

22 Q. And what does that entail? What does a DUI  
23 field investigation entail?

24 A. Field investigations are uh, obviously observing  
25 a PC for stop, uh, or so forth, or any -- any indicators

1 of uh, somebody passed out in a vehicle if you're not  
2 looking for PC you're looking for a welfare check. Once  
3 you contact that person uh, there's typically an odor of  
4 alcohol. There's some type of um, movements or  
5 indicators that they have, such as fumbling with their  
6 driver's license or impaired speech, glassy, watery eyes,  
7 um, a lot of times again, as I said, the odor of an  
8 alcoholic beverage and so forth.

9 Q. Okay.

10 A. From that point on, once you observe those  
11 things, you ask questions about the alcohol consumption  
12 and look for that as well as uh, standard field sobriety  
13 tests.

14 Q. Okay. What are the standard field sobriety  
15 tests?

16 A. You have a gaze nystagmus, which is a checking  
17 of the eyes.

18 Q. Okay. And what does that test entail?

19 A. That test entails uh, eight passes of the eyes.  
20 You're looking for equal tracking in the eyes and lack of  
21 smooth pursuit. Uh, you're looking for nystagmus, which  
22 is a distinct bouncing of the eyes um, at max deviation,  
23 which is to where the eye goes all the way to the corner.  
24 Um, and you basically put your finger about shoulder  
25 width when you're out there. (inaudible)... holds for



1 four seconds, their eyes bounce, um, you've got  
2 nystagmus. And then your last pass is for onset 45  
3 degrees, which is creating a white triangle in the corner  
4 of their eyes with their eye -- with their -- with the  
5 uh, center of the eye and then the outside.

6 Q. Okay. And is -- is there a point system that  
7 goes along with that test?

8 A. There is. There's three points for each eye.

9 Q. Okay. So six total points?

10 A. That's correct.

11 Q. And uh, are you trained to administer that test?

12 A. Yes, I am.

13 Q. Did you successfully complete that training?

14 A. Yes, I did.

15 Q. Did you administer that test on this evening?

16 A. I did.

17 Q. On Mr. Riendeau? And did he consent to that  
18 test?

19 A. I don't believe I -- I asked him to. I just  
20 told him I was gonna perform some tests and -- to check  
21 his sobriety.

22 Q. Did he actively refuse to do that test or  
23 anything?

24 A. No, he did not.

25 Q. No. Uh, so when you conducted that test uh,

1 what did you observe?

2 A. I observed uh, lack of smooth pursuit and I  
3 observed the max deviation for the nystagmus as well as  
4 um, onset prior to 45 degrees.

5 Q. Okay. Was that in both eyes?

6 A. That was in both eyes, yes.

7 Q. So that's a total of six points then?

8 A. That's correct.

9 Q. Which is the maximum for that test?

10 A. That is correct.

11 Q. Okay. What did you do next?

12 A. I then went to the walk-and-turn test, which is  
13 the next test in the standard field sobriety tests. That  
14 is where you have the person stand on -- with their left  
15 foot out in front of 'em. You have them put their right  
16 foot directly in front of it touching heel to toe. You  
17 have them stand in that position with their hands down by  
18 their side during the instructional phase. You then  
19 explain and demonstrate the test to them. Um, you tell  
20 them to take nine heel-to-toe steps forward and turn  
21 around, pivoting on your left foot taking small steps  
22 with your right foot, and you go back nine steps on that.  
23 And then you reiterate to them that they need to keep  
24 their hands down by their side, make sure they touch heel  
25 to toe, count out loud as they walk, and -- and look down

1 at their feet as they walk.

2 Q. Okay. So to clarify, there's two -- there's two  
3 phases of that test?

4 A. Yes.

5 Q. And what are those phases, just briefly?

6 A. The instructional phase is where you're havin'  
7 'em stand with their feet touching.

8 Q. And what's the other phase?

9 A. And then that's the actual test, the walk-and-  
10 turn test.

11 Q. Okay. And during the instructional phase, um,  
12 did you notice anything about Mr. Riendeau?

13 A. I --

14 Q. Well, first of all are you qualified to complete  
15 those tests -- or administer those tests?

16 A. Yes, I am.

17 Q. And did you have Mr. Riendeau perform those  
18 tests?

19 A. I did.

20 Q. And again did he actively refuse or --

21 A. No, he did not.

22 Q. -- tell you he didn't wanna do that test? And  
23 uh, did you conduct the instruction phase with  
24 Mr. Riendeau?

25 A. I did.

1 Q. And what did you observe?

2 A. Uh, during the instructional phase I do believe  
3 he lost balance. I don't have it written in my report.  
4 I have a different card that I would have to refer to  
5 that I don't have with me.

6 Q. Did he start early?

7 A. Yes, he did. You tell 'em when -- During the  
8 instructional phase you tell 'em not to move until you  
9 explain the test to them until you tell them to begin.  
10 Uh, that is one of the indicators. If they're not able  
11 to stay in that position or not able to follow your  
12 instructions.

13 Q. Um, did you write a police report when you did  
14 this?

15 A. I did.

16 Q. And did you do a supplemental uh, DUI  
17 investigation report?

18 A. I did.

19 Q. And is that uh, supplement -- is that all true  
20 and accurate?

21 A. Yes.

22 Q. Would it refresh your recollection to look at  
23 that report right now?

24 A. It would.

25 Q. Could you please do so, particularly regarding

1 the walk-and-turn instruction stage?

2 A. I don't have that printed off. I just have the  
3 actual narrative.

4 Q. Do you mind if I (inaudible)... mine?

5 MR. JUDD: May I approach, your Honor?

6 THE COURT: You may.

7 Q. Handing you a copy of that. Is that -- What is  
8 that I just handed you?

9 A. This is a uh -- It's a pamphlet that we have.  
10 It's stapled together. It goes through the test with us.  
11 Um, and then you can fill that out based on the  
12 observations you have during the field sobriety tests.

13 Q. Okay. And is that the -- a copy of the report  
14 you filled out for Mr. Riendeau?

15 A. Yes, it is.

16 Q. And regarding the instruction phase again, um,  
17 now that you've refreshed your recollection, did  
18 Mr. Riendeau start early?

19 A. He did not.

20 Q. Okay.

21 A. Just could not keep his balance.

22 Q. Okay. And then um -- I'll let you hold on to  
23 that in case um, you need it. So that's one -- Is that  
24 one point then on the instruction phase?

25 A. Yes.

1 Q. So then to the performance phase, um, did you  
2 instruct Mr. Riendeau how to do that?

3 A. Yes, I did.

4 Q. And did he attempt to perform that test?

5 A. He did attempt.

6 Q. And what are the points systems again on that  
7 test?

8 A. On the second part there is -- you see whether  
9 -- 'cause once you tell them to begin a test they  
10 continually walk and don't stop until they're done with  
11 the test. If they stop at any time during the test they  
12 -- that is a point, as well as they've missed heel to toe  
13 as instructed, if they step off the line, uh, if they  
14 raise their arms at all during the time that they're  
15 walking. The -- If they don't follow your directions on  
16 the turn, and if they take more or less steps.

17 Q. Okay. And so how many points total is that?

18 A. There's a total of um, I believe six points on  
19 that and there's -- he maxed his points on that.

20 Q. Okay. So you're saying he got points on all  
21 those separate indicators?

22 A. Yes.

23 Q. Okay. So what did you do next?

24 A. We moved on to the uh, last test of the field  
25 sobriety tests which is the one-leg stand.

1 Q. And are you trained to administer that test?

2 A. Yes, I am.

3 Q. And what does that test entail?

4 A. That test is again a demonstration. Um, as you  
5 demonstrate and explain the test to them you tell them to  
6 pick whichever foot they prefer uh, to stand on, lift one  
7 leg approximately six inches off the ground. You have  
8 them point their toe to where it's level to the ground.  
9 Um, keep their hands down by their side and count out  
10 loud -- as they look at their toe and they count out loud  
11 1001, 1002 and so on.

12 Q. Okay. And did you administer that test on  
13 Mr. Riendeau?

14 A. Yes, I did.

15 Q. And again, did he actively resist or refuse to  
16 do that test?

17 A. He did not.

18 Q. Did he attempt to perform that test?

19 A. He did.

20 Q. And how -- what did you evaluate in his  
21 performance?

22 A. During that time -- That test is a 30-second  
23 test. There is broken down into zero to 10 seconds, 11  
24 to 20, and the last 21 to 30 seconds. If they sway  
25 during the test, if they raise their arm, hop or put

1 their foot down at any time uh, it's an indicator.

2 Q. And um, how many points did you notice in that  
3 test?

4 A. He has uh, indicators at the swaying, raisin'  
5 his arms and puttin' foot down throughout the entire 30  
6 seconds, so that would be 3 points on that test.

7 Q. So then what did you do next?

8 A. At that point I placed Mr. Riendeau into  
9 custody, explained to him that I'd be transporting him to  
10 the Public Safety Building.

11 Q. Did that in fact happen?

12 A. It did.

13 Q. Any incidences regarding transport?

14 A. No.

15 Q. So you transported him to the jail. What did  
16 you do next? Or what do you generally do when you get to  
17 the jail on a DUI?

18 A. Once we get to the jail a person has to go  
19 through the pre-booking process. We conduct -- handcuff  
20 and a pat search out in the field. However, the jail  
21 again to make sure of their safety does another pat  
22 search once you bring an in custody in. They will pat  
23 them down in the pre-booking area. Typically during that  
24 time I'll go in, fill out a booking sheet and start the  
25 paperwork process just so it doesn't take his lunchtime.



1 Once they're down patting them down they'll send them in  
2 to me and have them sit down in front of me.

3 Q. Okay. And uh, did that happen this time with  
4 Mr. Riendeau?

5 A. It did.

6 Q. Again was there any incidents?

7 A. There was not.

8 Q. And --

9 MR. JUDD: May I approach, your Honor?

10 THE COURT: You may.

11 Q. After you run 'em through that pre-booking  
12 process, what do you do on a DUI arrest?

13 A. I'll have them come in um, and I will have them  
14 sit in front of me. I will have them open their mouth.  
15 I'll look into there to see if there's any foreign  
16 substances within their mouth, check to see if there's  
17 gum or chew or anything of that nature that's in there,  
18 inside their mouth.

19 Q. Why do you do that?

20 A. Gum and chew and so forth can -- can hold uh, an  
21 alcohol beverage or contain that alcohol within their  
22 mouth and so you'll have residual mouth alcohol um,  
23 rather than just breath alcohol.

24 Q. Did you check Mr. Riendeau's mouth?

25 A. I did.

1 Q. And was it clear of any substances?

2 A. Yes, it was.

3 Q. Then what do you do?

4 A. At that point, once I check their mouth I tell  
5 them um, and it's pretty standard, I tell everybody don't  
6 belch, burp, vomit, um, or bring up anything from their  
7 -- from their stomach, any intestinal-type juices, like  
8 if you have -- have (inaudible)... belch or somethin' of  
9 that nature. I tell them not to do that until we're done  
10 completing the test. There's a 15-minute observation  
11 period that you have to do before the first breath on the  
12 Intoxilyzer, and so that's why I just tell them not to do  
13 it until after we're done with the test.

14 Q. Okay. That 15-minute uh, observation period,  
15 did you conduct that on Mr. Riendeau?

16 A. I did.

17 Q. And did you monitor him that entire 15 minutes?

18 A. I did. I -- There's a booking counter. I'm  
19 usually on this side, the person is sitting on the other  
20 side approximately right where the defense table is right  
21 now, maybe even a little closer. During that time I'm  
22 talking to them, asking them for information on the  
23 booking sheet. I'll read them the ALS form and get some  
24 paperwork processed while I'm doing that observation  
25 period.

1 Q. And the ALS form you mentioned, what is that?

2 A. Uh, the uh, license suspension advisory form.

3 Q. And what does that form do?

4 A. That form's a civil form um, advising them of  
5 the consequences of taking and failing the test as well  
6 as not taking the test.

7 Q. Okay. And did you go over that form in detail  
8 with Mr. Riendeau?

9 A. I did.

10 Q. And did he have any questions about that?

11 A. I don't believe so.

12 Q. At the end of the -- well, during this  
13 evaluation process are you -- are you talking to  
14 Mr. Riendeau or --

15 A. Yes, I'm talking to him, again, as I said, goin'  
16 through the booking process. I'm askin' him questions  
17 for the booking sheet that need to be answered. I'm  
18 reading the form to them. Sometimes, you know, if a  
19 person -- If I go through the paperwork quickly I'll --  
20 I'll talk to them. I don't remember our specific  
21 conversation with Mr. Riendeau, but I did have my VIEVU  
22 body worn camera on during the entire contact.

23 Q. Okay. And um, at the end of the 15-minute  
24 observation period and after reading Mr. Riendeau and  
25 having him go over the ALS form, did he submit to a

1 breath test?

2 A. Yes, he did.

3 Q. And what is the -- What is the breath test at  
4 the Kootenai County Jail?

5 A. There is a machine called the Intoxilyzer. It --  
6 It's a rather large machine. I don't know the chemical  
7 process. The jail deputies monitor that. There's a BTS  
8 expert up there that deals with the formulas and so forth  
9 and the contents of the uh, liquids that go into the  
10 machine. However, our training is to administer the test  
11 using the machine. You push a button to start the  
12 machine. At that point on it prompts you through  
13 questions such as their driver's license information,  
14 their name, date of birth. The operator, which would be  
15 me, I enter my information in there, um, and then it does  
16 a self check and a calibration check.

17 Q. Okay. And did you do all those things on the  
18 night you were with Mr. Riendeau?

19 A. I did.

20 Q. Or did you do them with Mr. Riendeau?

21 A. Yes.

22 Q. And was there anything out of the usual?

23 A. No.

24 Q. So from your perspective everything with that  
25 machine was working properly?

1 A. Yes, the equipment functioned properly.

2 Q. And does that equipment -- Or what does that  
3 system -- what does that -- How is that run? What does  
4 it do when you start it up?

5 A. It'll purge itself. It'll start up. You'll  
6 hear pumps inside there and they're -- they're doin' a  
7 calibration check for the formula that's on the outside.  
8 It also clears itself. It'll actually even tell you when  
9 it's clearing in between the person's uh -- before the  
10 first breath and actually in between the first and second  
11 breath. It'll clear itself of any residual alcohol  
12 within the machine to make sure there's no other samples.  
13 So if you give that person their first sample, there's no  
14 alcohol from the person that took that test before. And  
15 in between the first sample and the second sample there's  
16 no residual alcohol in the machine from the first -- from  
17 the person's first breath to second breath.

18 Q. And is that -- Are those referred to -- Are  
19 those the air blanks?

20 A. That's correct.

21 Q. And then it also -- Does it -- Does it do  
22 simulation checks?

23 A. Uh --

24 Q. Or solution checks?

25 A. Yes, that's the solution checks, and that's

1 through a -- there's a container next to it with a .08  
2 and a .20 solution in there.

3 Q. And again in this -- in this case the air blanks  
4 worked properly?

5 A. That's correct.

6 Q. And the simulation check or the solution check  
7 was accurate or --

8 A. That's -- That's correct.

9 Q. -- conforming? Um, while you're doin' this,  
10 while you're starting this machine up, was Mr. Riendeau  
11 present with you?

12 A. Yes.

13 Q. Where was he?

14 A. I will have a person when I'm administering that  
15 test actually seated just about where the -- the uh,  
16 judge is and maybe a little closer in the chair right  
17 next to me. So I'm monitoring the equipment as well as  
18 the person right next to me. I'm in between 'em both.

19 Q. Okay. So he was -- he was there. He was aware  
20 of everything that was going on that you were doing?

21 A. That's correct.

22 Q. Were you explaining the process to him when you  
23 did that?

24 A. I was probably explaining him how to take the  
25 breaths. I'll instruct a person to stand up, put their

1 hands behind their back just so they're not grabbing the  
2 instrument itself and breaking it. Um, I'll explain to  
3 them that it's gonna take approximately 30 seconds. I'll  
4 tell them to take a big, deep breath and explain to them  
5 how to take that test.

6 Q. Okay. And what exactly do they blow into? How  
7 does that work?

8 A. The machine has a arm, or maybe a better term  
9 would be like a long tube that comes out of it, somewhere  
10 to -- a straw, it's just a little bit more reinforced.  
11 At that point we'll take a mouth uh -- a saliva trap and  
12 a mouthpiece for the machine. Those are individually  
13 packaged. They're packaged in plastic so that nobody's  
14 used them prior to. They're sanitary and again no  
15 residual alcohol. we'll take those out of the packaging.  
16 We'll put the spit trap onto the tube first and then the  
17 mouthpiece over that.

18 Q. Okay. And did you do that in this situation  
19 with Mr. Riendeau?

20 A. I did.

21 Q. And did you ask Mr. Riendeau to perform that  
22 test?

23 A. I did.

24 Q. And did he perform that test?

25 A. Yes, he did.

1 Q. And did Mr. Riendeau at any time indicate any  
2 unwillingness to -- to do that test?

3 A. No, he did not.

4 Q. Now, you stated earlier -- Did he -- Did he  
5 successfully complete the test?

6 A. He completed the test.

7 Q. Yeah. Well, yeah, I guess successfully is how  
8 we define that. Did the test work fine?

9 A. Yes, the test worked fine.

10 Q. And there was a printout?

11 A. Yes, there was.

12 Q. And what was that printout?

13 A. It was 1.7 and 1.8.

14 Q. Okay. And so at that time what do you do?

15 A. At that time I explained to him that he blew  
16 over the legal limit in the state of Idaho, .08. I  
17 explained to him that he's never had a DUI before, it's a  
18 DUI first offense. I tell him his bond and I take him  
19 over to the uh -- to the area of where they're either  
20 watchin' TV or a hold cell, whichever is requested by the  
21 jail deputies.

22 Q. How would you describe your entire interaction  
23 with Mr. Riendeau? Was it cordial or hostile? How would  
24 you describe it?

25 A. Uh, as I said earlier, at first he was kind of



1 questioning more the fact that I was in front of his  
2 house. He kind of almost insinuated that I let him go  
3 because he was in his driveway um, and that his dad was  
4 home. He even asked me to move the stop at one point  
5 'cause he didn't want me to conduct the test in front of  
6 his dad if he happened to come out. Once he got past  
7 that initial confrontation or realized that wasn't gonna  
8 happen, he actually settled down a lot and was uh, pretty  
9 cooperative.

10 Q. Okay. And so at -- How 'bout at the jail? Was  
11 he cooperative the entire time at the jail?

12 A. Yes.

13 Q. Okay. You mentioned earlier that you had a body  
14 camera, is that true?

15 A. That's correct.

16 Q. And how does that work?

17 A. It's a body worn camera. It's approximately  
18 that big. It attaches to the front of our shirt right in  
19 between our pockets. We flip the switch down and that  
20 records during our contacts.

21 Q. Okay. And on this incident with Mr. Riendeau  
22 what did you record with that body camera?

23 A. I recorded my contact initially at the  
24 residence, um, in that stop, as well as once we got to  
25 the observation period at the Public Safety Building.

1 Q. Okay. So is that entire observation period on  
2 that video?

3 A. That's correct.

4 MR. JUDD: And that's been previously been admitted,  
5 your Honor?

6 THE COURT: That is correct.

7 Q. In addition to the two body cams did you have  
8 another video?

9 A. There is a program which is our in-car dash  
10 system that monitors from the inside of the vehicle.

11 Q. Okay. And where is that mounted on the vehicle?

12 A. It's right inside the windshield right at the  
13 top. If I'm in the driver's seat it's approximately  
14 right over here and will angle towards wherever we need  
15 it to angle.

16 Q. And that -- that video um, that obviously is  
17 limited perspective. It's not everything that you saw  
18 that night, is that correct?

19 A. Correct. You've -- You know, I have a range of  
20 visibility whereas the vehicle camera mostly is straight  
21 forward.

22 Q. Okay. And you don't have a rear video in the  
23 car?

24 A. We do but it only videotapes the back seat.

25 Q. Oh, okay. And did you have your COBAN video

1 operating on that night, the 21<sup>st</sup> of March?

2 A. Yes, I did.

3 Q. And did you catch the alleged violation you  
4 perceived by Mr. Riendeau?

5 A. Yes, I did.

6 MR. JUDD: And your Honor, that's been previously  
7 admitted. At this time I believe I have no further  
8 questions.

9 THE COURT: All right. Mr. Logsdon, you may  
10 inquire.

11 MR. LOGSDON: Thank you, your Honor.

12 CROSS-EXAMINATION

13 BY MR. LOGSDON:

14 Q. So after you came to the conclusion that my  
15 client was intoxicated, did anything happen between your  
16 arresting him and getting him back to the sheriff's  
17 station?

18 A. I don't believe so.

19 Q. Okay. So you were able to go straight there?

20 A. I -- I don't recall, but I believe so.

21 Q. Um, are you equipped with a radio?

22 A. Yes.

23 Q. (inaudible)...

24 A. Yes.

25 Q. And do you have a phone?

1 A. Yes.

2 Q. Are you -- How many police officers are in the  
3 Coeur d'Alene Police Department?

4 A. Approximately 70 sworn.

5 Q. And at any one time, how many of you are  
6 serving?

7 A. We have minimum standards that are on the road  
8 per shift.

9 Q. Sure.

10 A. Um, they vary between days and graves.

11 Q. Do you have any idea how many would have been on  
12 at that time?

13 A. Minimum manning is usually approximately six  
14 between either dayshift and swing or (inaudible)... and  
15 grave.

16 Q. And that's within the city of Coeur d'Alene?

17 A. That's correct.

18 Q. You had testified to reading a form that's  
19 sometimes referred to as the ALS form to my client prior  
20 to requesting that he do the breathalyzer test, is that  
21 right?

22 A. That's correct.

23 Q. I'm gonna show you a document. Can you state  
24 for the record what that is?

25 A. That is the Notice of Suspension or ALS form.

1 Q. Do you recognize that?

2 A. I do.

3 Q. When's the last time you saw either that or what  
4 it's a copy of?

5 A. Uh, probably the last time I worked a week ago.

6 Q. What about --

7 A. Oh, this, this particular copy?

8 Q. -- I mean this particular one?

9 A. The night I filled it out.

10 Q. And that was?

11 A. On the 21<sup>st</sup>.

12 Q. Which was the night when this happened, correct?

13 A. That's correct.

14 Q. All right. So that's the -- That is the ALS  
15 form for this case, correct?

16 A. Yes, it is.

17 MR. LOGSDON: Your Honor, I would ask that that be  
18 submitted as the Defendant's Exhibit 1.

19 THE COURT: Uh, we'll mark it Defendant's A. And  
20 any objection to that being admitted?

21 MR. JUDD: No, your Honor.

22 THE COURT: It would be admitted.

23 (Defendant's Exhibit A - Admitted)

24 MR. LOGSDON: I have no further questions for this  
25 officer. Thank you.

1 THE COURT: Mr. Judd, any questions, any redirect?

2 MR. JUDD: No, your Honor.

3 THE COURT: Let's see if I have any questions here.  
4 I do have a few, Officer.

5 COURT'S EXAMINATION

6 Q. Now, you were in a marked patrol car?

7 A. That's correct, your Honor.

8 Q. Were you in a uniform and everything --

9 A. Yes, your Honor.

10 Q. -- like -- as you were on duty? Okay. Now, um,  
11 the name of the individual involved here has been alluded  
12 to, but nobody has been identified. Is -- Is the person  
13 that you're talking about in your testimony here today?

14 A. Yes, he is, your Honor. He's seated to uh, my  
15 right wearing a black shirt and jeans.

16 Q. Okay. And do I understand your testimony  
17 correctly that um, you didn't activate your lights and  
18 pull him over, he had already been stopped in front of  
19 his house there?

20 A. That's correct, your Honor. He had pulled into  
21 his driveway.

22 Q. He was in his driveway.

23 A. And uh, I pulled up to the left curb line  
24 southbound in the northbound lanes.

25 Q. And I -- Do I understand correctly, you said you

1 didn't block him in in any way?

2 A. No, your Honor.

3 Q. And then he saw you and then as he was stepping  
4 out of the car he approached you?

5 A. That's correct.

6 Q. You talked about slow reactions, speech was  
7 slurred, clumsy uh, handling of this food that he had.

8 A. Yes, your Honor.

9 Q. Um, but I didn't hear you say anything about he  
10 smelled of alcohol or anything like that.

11 A. At the original time that I contacted him it was  
12 very windy that night. He was wearing an overwhelming  
13 cologne. It wasn't until after I had him in custody and  
14 was a little bit more close to his person that I could  
15 smell an odor of an alcoholic beverage.

16 Q. But not out at the scene.

17 A. Not out at the scene.

18 THE COURT: Any questions in light of the Court's,  
19 Mr. Judd?

20 MR. JUDD: No, your Honor.

21 THE COURT: Mr. Logsdon, how 'bout you?

22 MR. LOGSDON: No, your Honor.

23 THE COURT: All right. You may step down then.  
24 Thank you.

25 THE WITNESS: All right. Thank you, your Honor.

1 THE COURT: May the officer be excused or would you  
2 like him to remain? What are your thoughts on that?

3 MR. JUDD: The State's fine with him leaving, your  
4 Honor.

5 THE COURT: Any objection?

6 MR. LOGSDON: No objection.

7 THE COURT: All right. You're excused or you can  
8 remain, whatever you would like to do.

9 THE WITNESS: Thank you, your Honor.

10 THE COURT: State have any other witnesses?

11 MR. JUDD: No, your Honor.

12 THE COURT: Do you rest your case at this time?

13 MR. JUDD: Well, we have the videos. I don't know  
14 how the Court wants to handle that.

15 THE COURT: Well, it sounds like only two of them  
16 are of any real relevance here. How long are they?

17 MR. JUDD: I think I would publish the -- the in car  
18 video at this point for the -- we really only need to  
19 watch the first I think two, three minutes of that video.  
20 It's the actual traffic --

21 THE COURT: Okay. So did you wanna cue that one up  
22 and then we can watch that one?

23 MR. JUDD: Yes, your Honor.

24 THE COURT: Is that what you wanna do?

25 MR. JUDD: And then we --



1 THE COURT: Okay.

2 MR. JUDD: -- probably need to watch the --

3 THE COURT: Why don't we do that.

4 MR. JUDD: -- or I don't know how you wanna do it.

5 Submit it.

6 THE COURT: And so is that -- is that Plaintiff's 1?

7 MR. JUDD: Unless the Court simply wants us to

8 submit those and you wanna review 'em.

9 THE COURT: If the first one's only a couple minutes

10 long, why don't we watch that.

11 MR. LOGSDON: Well, your Honor, in light of the

12 officer's testimony I was actually gonna ask that the

13 Court review the middle -- the other uh, thing that the

14 State's admitted as well.

15 THE COURT: And the other thing is what now?

16 MR. LOGSDON: The uh, VIEVU cam from the actual --

17 the (inaudible)...

18 THE COURT: Oh, so you want -- you want me to watch

19 'em all then.

20 MR. LOGSDON: At this point, yes.

21 THE COURT: Okay. And then -- And how long will --

22 would that take me to view all of those then?

23 MR. JUDD: That will be at least -- That will be at

24 least an hour.

25 THE COURT: Oh, all right. I'll --

1 MR. JUDD: There's a 15-minute observation period,  
2 and that's -- that video's probably about 22 minutes  
3 long.

4 THE COURT: Okay.

5 MR. JUDD: Uh, and then the -- the stop and the  
6 VIEVU video are both the entirety of the interaction  
7 doubled up. Uh --

8 THE COURT: Okay. Well then -- then we're probably  
9 not gonna do that right now then.

10 MR. JUDD: You can actually --

11 MR. LOGSDON: I don't have any issue with the Court  
12 ruling on this later.

13 THE COURT: So -- And -- And is this in a format  
14 that I can pop it into my computer and watch it on the  
15 computer?

16 MR. JUDD: It's -- well, it's made for the court's  
17 DVD players, so if your computer has a DVD player.

18 THE COURT: It -- I think it does. And I've been  
19 able to -- I've been able to view most of -- well, it  
20 says DVD on there, I know that. But um, I've been able  
21 to view most of the things that have been submitted on  
22 the -- on the computer. So I'll watch those, okay? And  
23 Mr. Logsdon, did -- do you have testimony that you'll be  
24 presenting today?

25 MR. LOGSDON: I was only asking that those uh, be

1 watched for impeachment purposes, your Honor, and then  
2 that would be the only evidence that we'd put on.

3 THE COURT: Okay. All right. How 'bout if we -- if  
4 you give me some time to view those, and then should I  
5 have you come back and then do some closing arguments  
6 after that and make a decision from there? would that be  
7 appropriate to do?

8 MR. LOGSDON: Um, for the motion suppress the stop  
9 and the -- that part of it, possibly. Um, but I think we  
10 could do the motion to suppress the -- the uh, breath  
11 test could be done at this point with the record that we  
12 have and then we could also do the motion in limine.

13 THE COURT: All right. Well um, so there's -- Other  
14 than me viewing the videos, uh, there's no other evidence  
15 to be submitted.

16 MR. LOGSDON: No, your Honor.

17 THE COURT: Okay. So what -- what are your  
18 arguments on the part that you wanted to do today then?  
19 And then I'll get the State's response.

20 MR. LOGSDON: Your Honor, the motion to suppress the  
21 breath test, which we filed separately and then filed a  
22 memorandum in support of that, is largely based on the  
23 McNeely (phonetic) case that came down not too long ago  
24 that famously held that Schmerber (phonetic) did not in  
25 fact mean that in every DUI case you would automatically

1 have a per se exception to requiring a warrant before you  
2 did a blood draw. Um, and the reason why that's  
3 important is because the complied consent laws that  
4 everybody is so excited about were essentially started as  
5 a response to what was believed by essentially every  
6 state court that Schmerber had said that in a DUI  
7 situation you have a per se exigent circumstance and  
8 therefore the Fourth Amendment -- Once -- Once your  
9 officer has probable cause to believe a DUI is going on,  
10 the Fourth Amendment's not going to be at issue in terms  
11 of doing a -- an evidentiary search from that person.

12 And so you have these implied laws. Now, if you go  
13 back to 116 Idaho 368, which I quoted at length in my  
14 memorandum, the Idaho Supreme Court goes through kind of  
15 ad nauseum how this was developed; that essentially  
16 implied consent's not really consent as we normally think  
17 of it. It's not a legal term so much as it's talking  
18 about the idea that the physical refusal for something  
19 that you're not allowed to refuse is something that can  
20 be punished. And so it really doesn't have anything at  
21 all to do with the Fourth Amendment.

22 And so what that leaves is, in a case involving a  
23 DUI where there is no reason why the officer didn't need  
24 a warrant and he did not get a warrant that the either  
25 blood draw or a blood test or whatever kind of

1 evidentiary test they wanna do, they can't do it until  
2 they've either received that warrant or they've found a  
3 way around the warrant requirement.

4       In this particular case I think the State's argument  
5 is gonna have to be that some kind of consent was  
6 provided, uh, but the trouble, as I pointed out in my  
7 memorandum, is that that's a consent that's provided  
8 after they're read the ALS form. Now, the ALS form tells  
9 them that they're required to give the -- give a breath  
10 test, and in fact if they refuse here's all the different  
11 civil things that are gonna happen to you. Uh, and  
12 that's totally unlawful. Under no circumstances can an  
13 officer come to your house and say, Hey, I don't have a  
14 warrant to get in but you're required to let me in anyway  
15 and if you refuse to allow me inside your house the State  
16 of Idaho says that I get to fine you \$300. Until the  
17 officer actually has the warrant, he cannot come up and  
18 say any of these things. Once he's got it, he can do  
19 whatever he wants and then you're obstructing an officer  
20 and what have you. But until he's actually be authorized  
21 under the Constitution to do what he's doing, he can't go  
22 about saying that he is and then telling you that he's  
23 going to punish you if you stand on your rights.

24       'Cause that's precisely what happens in Idaho  
25 currently. The officer brings the person in, there's no

1 warrant, nobody ever sought a warrant, there's no reason  
2 not to get the warrant, they read the ALS form, which  
3 essentially states a bunch of things that aren't true,  
4 and bullies them into consenting, okay, fine, I'll take  
5 your test. And that's what happened in this case  
6 according to the officer. Therefore, the breath test in  
7 this particular case has to be suppressed. Thank you.

8 THE COURT: Mr. Judd.

9 MR. JUDD: Well, first off, your Honor, I don't know  
10 that we can make argument on this without your Honor  
11 reviewing that video. It's pretty clear if you watch  
12 that video that he consented. Two, I don't see anywhere  
13 in the McNeely opinion where it has anything to do with  
14 ALS suspensions or ALS type sanctions being  
15 unconstitutional now. In fact, they note that the states  
16 still have that ability to enforce DUI laws with those  
17 ALS laws. So we don't have a blood draw here. We have a  
18 consensual breath test. I think the video will indicate  
19 that Officer Rios told him what he would do in the  
20 situation where um, were Mr. Riendeau not to complete a  
21 breath test he told him he'd go to the hospital and get  
22 his blood, and that was all he stated. That was at that  
23 time certainly the truth. And even at this time it could  
24 certainly be the truth.

25 There's no testimony regarding the officers on duty.

1 McNeely doesn't prohibit breath tests -- or excuse me,  
2 blood draws absent a warrant. It just simply states that  
3 not in every case you need a warrant. So I don't see  
4 that McNeely applies at all, frankly. But again I think  
5 the Court will need to review the video, see that this  
6 was clearly a consensual blow. Um, but for -- on either  
7 -- on either token this was a perfectly valid breath test  
8 and I don't see anything wrong with the way Officer Rios  
9 handled it.

10 It was testified today that -- and it's clear on the  
11 video that they're completely cordial throughout.  
12 Mr. Riendeau asks a few clarifications and Mr. -- or  
13 Officer Rios answers them and Mr. Riendeau provides a  
14 blow. Um, to -- to allege that this was somehow coerced  
15 um -- and I think if your Honor needs some case law on  
16 that (inaudible)... the clerk, the case where the officer  
17 made comments regarding going to the hospital for a  
18 forced blood draw and that that somehow vitiated the  
19 consent, which the Supreme Court clearly stated it  
20 didn't. Um, in this case, under that ruling, certainly  
21 there was no coercion or deceit or anything of that  
22 nature on the behalf -- on Mr. -- or Officer Rios'  
23 behalf. Um, so if for some reason that Mr. Rios did need  
24 a warrant, which the State's certainly not relenting on,  
25 he was -- he received consent from Mr. Riendeau. It's a

1 perfectly valid blow.

2 THE COURT: Well, um, Officer Rios has testified  
3 here this afternoon as to his background and training as  
4 a Coeur d'Alene patrol officer for 12 years. He's gone  
5 through the POST Academy, he's been POST certified, he's  
6 had training since then. Um, he does investigations on a  
7 regular basis regarding DUIs. Um, he normally works the  
8 graveyard shift, and on the 31<sup>st</sup> of March of this year he  
9 was on duty. It was about 1:00 in the morning. He had  
10 just left the public safety facility and apparently there  
11 was a call relative to a missing person.

12 He was westbound on Harrison Avenue here in  
13 Coeur d'Alene, Kootenai County, state of Idaho, and while  
14 he was westbound on Harrison Avenue, uh, as I understand  
15 his testimony he was -- he was kind of going up a hill,  
16 he saw a vehicle coming down a hill approaching him, and  
17 uh, his testimony indicated that the -- this approaching  
18 vehicle was uh, way over to the right side of -- of the  
19 -- of Harrison Avenue, which as I understand it would be  
20 the south side of Harrison Avenue. Uh, this vehicle was  
21 eastbound and it was over the -- the white line and into  
22 the bike lane.

23 He said that the um, eastbound lane is divided, it  
24 has -- you know, he talked about the white lines and then  
25 the bike lane on the south side of the road, and then



1 there was center dividing line. And he testified that  
2 this approaching vehicle was over that white line that  
3 divided the lane of travel and the bike lane, and it was  
4 over that white line into the bike lane for about 50 feet  
5 or one to two seconds. Uh, wasn't like halfway over but  
6 -- but, you know, both -- both of the -- the right side  
7 tires, as I understood the testimony, were over that  
8 line.

9 So the officer uh, pulled off, turned around,  
10 pursued the vehicle. The vehicle had turned right on 10<sup>th</sup>  
11 Street. And as the officer approached um -- and he  
12 indicated the conditions were clear, there was no snow or  
13 anything like that -- um, as he approached he saw that  
14 the vehicle had pulled into a driveway, stopped, and so  
15 the officer stopped on -- on the right side of the street  
16 there. He was not blocking the vehicle in in any way,  
17 and the driver of the vehicle was getting out.

18 Officer Rios indicated clearly that no -- he did not  
19 activate his lights, did not block him in in any way, but  
20 the driver got out of the vehicle and approached him and  
21 he had a -- it looked like he had a bag of food or  
22 something, and then they started up a conversation about  
23 what was goin' on.

24 Officer Rios told um, the gentleman why he was  
25 contacting him. He told him about what he observed to be

1 a perceived violation on Harrison Street. And as Officer  
2 Rios was uh, in contact with who was described as  
3 Mr. Riendeau, um, he described that he observed slow  
4 reactions on him, his speech was slurred, he had some  
5 clumsy actions with regard to the food that he was  
6 holding. Officer Rios asked him if he had drank any  
7 alcohol. He said no. He asked him if he had been using  
8 any drugs or prescriptions or anything. He said no. And  
9 then later when I asked the officer some questions he  
10 said he did not smell any alcohol on him at that time  
11 because it was windy conditions.

12 But, due to the slow reactions, the slurred speech,  
13 the clumsy actions and so on and what he observed on  
14 Harrison, the goin' -- you know, driving over into the  
15 bike lane, the officer decided to do some uh, testing and  
16 DUI investigation. So he talked about the HGN test,  
17 which was explained to Mr. Riendeau, uh, conducted that.  
18 Uh, he felt that there was a lack of smooth pursuit in  
19 both eyes, there was nystagmus at maximum deviation, and  
20 onset of nystagmus prior to 45 degrees in both eyes on  
21 all of these so he awarded him six points on that  
22 evaluation.

23 He explained the walk-and-turn test. Um, while in  
24 the instructional phase uh, the officer said that  
25 Mr. Riendeau lost his balance so he was given a point on

1 that. During the performance phase he felt that  
2 Mr. Riendeau um, had some issues with that as far as, you  
3 know, keeping the heel to toe, walking on line, turning  
4 as he was supposed to. He gave him six points on that,  
5 felt that Mr. Riendeau did not pass that test.

6 The one-leg stand was demonstrated and discussed  
7 with uh, Mr. Riendeau. The officer said that he had  
8 attempted to perform those. It was a 30-second test, but  
9 during the entire 30 seconds he felt that Mr. Riendeau  
10 was swaying, had raised his arms, put his foot down. He  
11 awarded him three points on that.

12 So he had uh, placed him into custody, transported  
13 him to the Public Safety Building. At the Public Safety  
14 Building they went through the pre-booking process. When  
15 that was completed Mr. Riendeau was brought in, sat down  
16 next to Mr. Riendeau. Officer Rios checked his mouth for  
17 foreign substances, made sure there wasn't any gum or  
18 chew or any objects in there that he was chewin' on. It  
19 was all clean. Told him not to burp, belch, or vomit.  
20 Um, he followed, according to his testimony, the 15-  
21 minute observation period before doing the first test.  
22 During that 15-minute observation period the officer read  
23 the ALS advisory form, which has been marked and admitted  
24 into evidence as Defendant's A. There was no indication  
25 that there was any burping, belching, vomiting or

1 anything like that.

2 The um, Intoxilyzer device was turned on, a  
3 calibration check, a self clearing, air blanks and all of  
4 that were done. The solutions checks according to the  
5 officer were all accurate and done properly. He  
6 explained to Mr. Riendeau how to blow into this long tube  
7 with the mouthpiece. A new one is used each time. And  
8 um, the indication in the testimony was that Mr. Riendeau  
9 did the test. There was no indication that he was not  
10 willing to do the test. He didn't refuse to do the test.  
11 And the test results as testified were a .17 and a .18,  
12 which are over the legal limit and therefore he was  
13 charged formally, and the officer indicated he was  
14 essentially cooperative throughout the -- the process.

15 Now, um, I -- you know, I understand we do have this  
16 new Supreme Court decision on the McNeely case dealing  
17 with blood draws, um, and I do understand that that is  
18 binding on the Courts, and uh, if uh -- if an individual  
19 is uh, stopped and investigated for suspicion of driving  
20 while under the influence of intoxicants uh, and the  
21 person says, no, I'm not going to do a blood draw and I'm  
22 not gonna do any tests or whatever, that the McNeely  
23 decision does require a search warrant be obtained absent  
24 some other exigent circumstances before forcing a blood  
25 draw.

1           Now, we don't have a blood draw involved here. what  
2 we do have is a breath test. And I'm not reading the  
3 McNeely decision as being expanded to um, a requirement  
4 that a person um, you know, uh, if he's refusing a breath  
5 test that they would -- you know, I don't think the  
6 officer can force the person to blow into the machine.  
7 Um, and if they want a blood test or blood draw, then  
8 they're gonna have to get a search warrant if the person  
9 doesn't consent to that, and I'm not sure that the  
10 implied consent law is gonna be sufficient to provide  
11 that.

12           Now, what I'm getting here is uh, uh, from -- if I'm  
13 understanding Mr. Logsdon correctly, he's feeling that  
14 the reading of the notice of the advisory form,  
15 Defendant's A, is kind of almost forcing or coercing a  
16 person to take a breath test. And I'm disagreeing with  
17 that. I don't think that's what the law says and I'm not  
18 sayin' that's what the facts say here. It appears to me  
19 that Mr. Riendeau has a decision to make. He can blow in  
20 the device or not. It's completely up to him. But if he  
21 doesn't, then there are going to be some potential  
22 penalties. He does have the ability to request a hearing  
23 and show cause why he didn't take the test.

24           So I'm not seeing anything here in the testimony to  
25 -- to vitiate what I -- what appears to me to be his

1 consent to take the two breath tests that he did. So I  
2 would -- And I don't think a search warrant is required,  
3 so I would at this point deny the motion to suppress the  
4 breath test based on McNeely and that type of an  
5 analysis.

6 Now, I will view the -- the videos though. And if I  
7 see somethin' in there that -- that looks like the  
8 officer was overbearing or, you know, had a gun to his --  
9 to Mr. Riendeau's head or somethin' like that uh, I might  
10 change my mind on that. But based on what I -- what I  
11 see here, um, the motion to suppress the breath test um,  
12 for lack of a search warrant or what is claimed to be an  
13 invalid consent would be denied.

14 MR. LOGSDON: Your Honor, if I could just ask for  
15 some clarification?

16 THE COURT: Sure.

17 MR. LOGSDON: Thank you. So is your Honor saying  
18 that consent was necessary for the breath test or could  
19 the officer have required it without first seeking a  
20 warrant?

21 THE COURT: What I'm saying is that it appears to me  
22 that Mr. Riendeau voluntarily consented to take the  
23 breath test.

24 MR. LOGSDON: And so he would have been required to  
25 have a warrant to make him take the breath test, but

1 because he consented --

2 THE COURT: No, I'm not -- No, I'm not sayin' that.  
3 No.

4 MR. LOGSDON: Okay.

5 THE COURT: But he could not have forced him to do  
6 it either.

7 MR. LOGSDON: Even if he had a warrant he couldn't  
8 have forced him to do it?

9 THE COURT: Well, I can't see -- I can't see a judge  
10 issuing a warrant to force somebody to take a breath  
11 test. I'm not sayin' that the -- I think you could get a  
12 search warrant to force somebody to do a blood draw but  
13 not a breath test. I don't -- How do you force somebody  
14 to blow into a machine that doesn't want to? I'm not  
15 seein' it.

16 MR. LOGSDON: These are all interesting questions,  
17 your Honor, but.

18 THE COURT: You gonna do the Heimlich Maneuver on  
19 him? I'm not seein' it.

20 MR. LOGSDON: But -- So is it the Court's holding  
21 that the breath test doesn't fall within the Fourth  
22 Amendment as a search?

23 THE COURT: No, I'm not sayin' that. I'm saying  
24 that Mr. Riendeau consented to take the breath test, and  
25 that consent is uh, by its nature an exception to the

1 warrant requirement. So I'm not seeing any need for a  
2 warrant. He consented to take the test.

3 MR. LOGSDON: Okay. So in terms of the ALS that  
4 your Honor has found is not coercive, is it the Court's  
5 finding that the civil liabilities that are being imposed  
6 if a person refuses to do the breath test absent that  
7 warrant, that those are not in violation of any of his  
8 Constitutional Rights?

9 THE COURT: That's correct.

10 MR. LOGSDON: Thank you, your Honor.

11 THE COURT: Yes. That is my finding. All right.  
12 But again, if I -- if I view the videos -- and I will --  
13 and if I see that the officer did something improper  
14 there, then I might change my mind on that.

15 Now, in watching the videos and so on, is there --  
16 is there an issue as to the 15-minute waiting period? Is  
17 that --

18 MR. LOGSDON: That was not one of the things that we  
19 were alleging, your Honor.

20 THE COURT: That's not one of the issues? Okay.

21 MR. LOGSDON: Uh, our -- I think at this point from  
22 my perspective I would want the Court to review the COBAN  
23 camera that -- what happened from the inside of the car.

24 THE COURT: All right.

25 MR. LOGSDON: So whether or not anybody actually



1 caught this bike lane stuff. And then I would also would  
2 like the Court to review the VIEVU camera and the actual  
3 interaction between my client and the officer.

4 THE COURT: I will do that. I will do that. Now, I  
5 will also indicate here that it -- it doesn't appear to  
6 me that there was any stop or anything. The officer did  
7 turn around and follow after observing a perceived  
8 violation of the law, that bein' him drivin' over into  
9 the bike lane and not in his lane of travel, um, but that  
10 he didn't -- he didn't activate his lights, he didn't  
11 block him in in any way, so um, you know, he did -- but  
12 he did have a contact with Mr. Riendeau, who he's  
13 identified here in open court as bein' the defendant, um,  
14 and -- you know, so that contact and that -- that part I  
15 think are proper. But -- But um, I do want to see if  
16 the video supports the claim that he was over into that  
17 bike lane or not. Sometimes those videos, especially  
18 night videos, are real hard to -- it's kinda hard to see  
19 sometimes. But the officer clearly said in his testimony  
20 that that happened, but we'll look at that for  
21 impeachment purposes. Maybe -- Maybe it shows somethin'  
22 else.

23 MR. LOGSDON: And that's also why I'd like the --  
24 the contact to be reviewed.

25 THE COURT: Sure.

1 MR. LOGSDON: I'm not sure it happened quite the way  
2 that that came out.

3 THE COURT: All right. I will take a look at that.

4 MR. LOGSDON: So at this point if we could do the  
5 motion in limine real quick and I'll get out of here.

6 THE COURT: We can do that. You bet.

7 MR. JUDD: Your Honor, if I may interject just on  
8 that motion in limine. The State would object to that  
9 being heard today based on the notice requirement. I'm  
10 not prepared to argue that today because I got notice two  
11 days ago.

12 THE COURT: Well, what -- what is your motion?

13 MR. LOGSDON: Oh, this is a --

14 THE COURT: What's the motion in limine? I wanna --

15 MR. LOGSDON: The motion in limine, your Honor, is a  
16 motion that I've been filing in all of my cases dealing  
17 with the uh, 18-8004(4) and the fact that at this point  
18 in time the Idaho State Police essentially in -- from my  
19 view, do not have a lawful method that they've created by  
20 which they can have breath tests introduced. The 18-8004  
21 is essentially the legislature has taken away from the  
22 Courts the ability to decide whether or not the machines  
23 are reliable and that -- They have stated that the ISP  
24 will create a method; that as long as that method is  
25 followed the officer will testify to having followed that

1 method and the breath test result will come in. But that  
2 at this point in time, there is no method for two  
3 reasons. One, that they are not promulgating the  
4 standards under the Idaho administrative procedure as  
5 they're --

6 THE COURT: IDAPA.

7 MR. LOGSDON: Exactly. -- as they're required to.  
8 And then second, that at this point, since January,  
9 they've actually so watered down those standards that  
10 there are none. And so that what Judge Lansing in her  
11 dissent in Wheeler said would -- was a problem and that  
12 she saw it coming, has at this point happened. In  
13 January they changed the mandatory waiting period to no  
14 longer being mandatory and a number of other things. And  
15 so at this point in time we're arguing that there --  
16 there is no standard, there is no method, and that -- so  
17 for either one of those reasons, these breath test  
18 results should not be able to come in in trial.

19 THE COURT: Now um, you've -- the motion in limine  
20 was filed May 6<sup>th</sup>, this is May 10<sup>th</sup>, and you have some um,  
21 authority in here that you're -- it looks like it's  
22 pretty lengthy. Do you need some more time to respond to  
23 that?

24 MR. JUDD: Yeah. I can't respond today, your Honor.

25 THE COURT: So how much more time do you need?

1 MR. JUDD: That will be for Mr. Gowey. I don't know  
2 when the next hearing we have is set.

3 THE COURT: When is this set for trial?

4 UNIDENTIFIED FEMALE VOICE: I believe the 20<sup>th</sup>.

5 MR. LOGSDON: That's correct, your Honor.

6 UNIDENTIFIED FEMALE VOICE: A week from Monday.

7 THE COURT: Oh, okay.

8 MR. JUDD: And if the Court could handle it that  
9 afternoon we'd be prepared.

10 THE COURT: Well, today is the 10<sup>th</sup>, that's set for  
11 the 20<sup>th</sup>. If -- If you could have Mr. Gowey submit any  
12 authority that he would like to submit, a response by the  
13 16<sup>th</sup> of May at 5:00 p.m., then um, between now and the 20<sup>th</sup>  
14 I'll view the videos, I'll review his information, look  
15 more thoroughly at what Mr. Logsdon has here, and then  
16 we'll have everybody back on the 20<sup>th</sup> at 8:30 and we'll  
17 enter some rulings and figure out what we're gonna do.  
18 Okay? Does that sound all right?

19 MR. JUDD: And your Honor, I'd also note -- Yes,  
20 that is fine by the State. I'd note we may file a  
21 supplemental memorandum regarding the motions to suppress  
22 to just clarify since we haven't filed anything on that.

23 THE COURT: Okay. Just have 'em all filed by the  
24 same time.

25 MR. JUDD: Thank you, your Honor.

1 THE COURT: 5:00 p.m. on the 16<sup>th</sup>, okay?

2 Mr. Logsdon, anything else?

3 MR. LOGSDON: Your Honor, I've filed on that motion  
4 in limine that I don't want to file anything else. But  
5 um, I raised the issue of the IDAPA and I -- I quote  
6 Judge Lansing. But I was looking at it today and I don't  
7 think there's a very good citing of what the law is on  
8 how to be able to tell what's supposed to fall under  
9 IDAPA and what doesn't. And so I would just tell the  
10 Court that Idaho Code -- or the case of SARCO  
11 Incorporated (phonetic), versus the State of Idaho,  
12 Department of Environmental Quality, et cetera, it's --  
13 the citation's 138 Idaho 719.

14 THE COURT: 138 Idaho 719, and it's on a SARCO case?  
15 Okay.

16 MR. LOGSDON: Right --

17 THE COURT: All right.

18 MR. LOGSDON: -- it'd be a SARCO case. On page 723  
19 they do a pretty decent job of outlining how you can  
20 identify what's supposed to be a rule and what isn't, and  
21 I failed to put that in the -- what I've got there --

22 THE COURT: Okay.

23 MR. LOGSDON: -- so I just wanted to let the Court  
24 know.

25 THE COURT: All right. Thank you. I will look at

1 that. All right, so anything else? You wanna get that  
2 to me, then I will look at it and we'll have some further  
3 discussions on it on the 20<sup>th</sup> at 8:30. And Mr. Riendeau  
4 will need to be back in court at that time. Okay?

5 MR. LOGSDON: Thank you, your Honor.

6 THE COURT: You are welcome. You are excused.

7 MR. LOGSDON: Have a good weekend.

8 THE COURT: I will try.

9 (Proceedings concluded)

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1 (Motion Hearings held on May 20, 2013)

2 THE COURT: Let's address Jesse Riendeau.

3 UNIDENTIFIED MALE VOICE: Riendeau.

4 THE COURT: Riendeau, that's right. Case Number's  
5 2013-5363. Mr. Gowey is here. Ms. Marshall is here. We  
6 -- Let's see what we did here on this one. We had a  
7 hearing on May 10<sup>th</sup>. We got testimony from Officer Rios  
8 at that time. We had three videos that were marked and  
9 admitted into evidence. These were um -- one was the  
10 VIEVU of the -- that the officer had on his uniform.  
11 That was Plaintiff's 3. I've reviewed that. Plaintiff's  
12 2 was the car video. I reviewed that. And Plaintiff's 1  
13 was the video at the jail. I've reviewed that. So uh,  
14 any other evidence or testimony on this one?

15 MR. GOWEY: Not with regard to the motion to  
16 suppress, your Honor. I know there's a motion in limine  
17 that is also yet to be heard and we would have some  
18 evidence on that, but.

19 THE COURT: All right. You would or would not have?

20 MR. GOWEY: We would. We would.

21 THE COURT: So we're gonna take more evidence today?

22 MS. MARSHALL: On the motion in limine.

23 MR. GOWEY: On the motion in limine your Honor.

24 That was my understanding, that that was not heard  
25 because the State objected to the timeliness of it on the

1 10<sup>th</sup>. And so my understanding was it was gonna be carried  
2 over till today, and we do have Mr. Johnston from the  
3 forensic lab here --

4 THE COURT: Okay.

5 MR. GOWEY: -- that we would be calling as a witness  
6 in that.

7 THE COURT: All right. Well, you may call a witness  
8 then.

9 MS. MARSHALL: Are we gonna make a ruling on the  
10 motion to suppress at this time, your Honor? Are you  
11 gonna reserve that?

12 THE COURT: Let's get all the evidence in and then  
13 I'll --

14 MS. MARSHALL: Okay.

15 THE COURT: -- rule on all of the motions, okay?

16 MR. GOWEY: State calls Jeremy Johnston, your Honor.

17 THE COURT: All right. Mr. Johnston, if you could  
18 step forward, raise your right hand to be sworn.

19 JEREMY JOHNSTON

20 was called as a witness on behalf of the Plaintiff,  
21 having been duly sworn, testified as follows to-wit:

22 THE COURT: Have a seat.

23 MS. MARSHALL: Your Honor, at this time we would  
24 object to Mr. Johnston being called as a witness and  
25 testify in this particular matter. We haven't been given



1 the proper disclosure and discovery with regards to his  
2 qualifications or whether -- the reason for him  
3 testifying today. If he's gonna be testifying as an  
4 expert, which would be my understanding, in this  
5 particular case, I don't believe that it's relevant.  
6 We're talking a legal issue here. We're not talking  
7 about an issue of which he could testify to, let alone we  
8 haven't been given the proper discovery disclosure with  
9 regards to Mr. Johnston today.

10 THE COURT: Mr. Goweey?

11 MR. GOWEY: Well, your Honor, my understanding of  
12 the motion in limine, there's certain arguments put forth  
13 in there which quite frankly misstate certain matters  
14 with regard to the standard operating procedures, and I  
15 think Mr. Johnston is certainly capable of testifying to  
16 those. I don't know -- I know he just testified in front  
17 of Judge Caldwell this morning on another -- the same  
18 motion I think virtually verbatim.

19 MS. MARSHALL: And I'm going to object to that at  
20 this time. I mean I don't know if I --

21 MR. GOWEY: Well, would you let me finish my --

22 THE COURT: Overruled. Overruled. Go ahead --

23 MR. GOWEY: I'm sorry.

24 THE COURT: -- and finish, Mr. Goweey.

25 MR. GOWEY: Your Honor, he testified on the same

1 motion in front of Judge Caldwell. Again, obviously, I'm  
2 not saying that you are bound by what Judge Caldwell did  
3 or feel that it was appropriate to offer it as evidence.

4 THE COURT: Right.

5 MR. GOWEY: But I think there is a legitimate basis  
6 for this. Some of the case law that's cited in this  
7 brief -- and again I'm not saying that Mr. Johnston's  
8 going to talk about the law and educate the Court as to  
9 what the law is. But he is familiar with some of those  
10 decisions. I think he can tell the Court certain things.  
11 For instance, if there wasn't any um, expert evidence,  
12 there wasn't a criminalist who testified in those  
13 matters, as the Court I think understands the law  
14 contrary to how it's stated at the bottom of page 1 of  
15 the motion in limine, Mr. Logsdon has (inaudible)...  
16 so-called regulations set forth in the standard operating  
17 procedures renders the test inadmissible in evidence, and  
18 that's never been the holding of the law. It certainly  
19 -- The law says pursuant to the provisions of 18-8004  
20 that if the standard operating procedures have been  
21 followed that the -- the results are admissible. But --  
22 and can be done so without having expert testimony to lay  
23 a foundation for it --

24 THE COURT: Okay. It sounds like her objection --

25 MR. GOWEY: -- at trial.

1 THE COURT: -- though goes to the -- you didn't  
2 disclose Mr. Johnston as a witness with his expert --  
3 expertise and his CV and all of that disclosed.

4 MR. GOWEY: Well, he's certainly been disclosed as a  
5 witness. Let me see, your Honor, if -- I know we've sent  
6 out his CV in other cases. Let me see, make sure whether  
7 that's true in this case or not. I know when I was  
8 looking at the cases today I saw that it had been done,  
9 but possibly I was looking at the other case that Judge  
10 Caldwell had 'cause I know that's also assigned to me but  
11 was done by one of my colleagues because I was here for  
12 this.

13 Your Honor, I -- I am not seeing that we did provide  
14 those in this case, at least in a cursory review of our  
15 list of court documents. Um, I guess I would argue that  
16 those certainly have been provided to defense, to the  
17 same counsel that brought this motion in other matters.  
18 There's certainly not -- There's no surprise. And -- and  
19 I -- As I mentioned a moment ago, the matter that was  
20 heard in front of Judge Caldwell this morning, certainly  
21 they were provided in that case. It's the same  
22 individual. So I guess to argue that they're some --  
23 somehow surprised or lack of notice is somewhat  
24 disingenuous in the State's mind since that information  
25 has been provided to the same defense attorney about the

1 same witness uh, at least in the other matter, your  
2 Honor.

3 THE COURT: Well, and when the matter goes to trial  
4 are you anticipating calling Mr. Johnston as a witness at  
5 the trial?

6 MR. GOWEY: That depends I suppose on how the Court  
7 rules with regard to the motion in limine today, your  
8 Honor, but it is not anticipated that we would be calling  
9 him absent --

10 THE COURT: Well, you know, clearly on trial  
11 witnesses and so on you're required to, you know,  
12 disclose witnesses and if they're experts their -- you  
13 know, their CV and all of that. But the hearing that we  
14 had the other day and the hearing that we're continuing  
15 to have today is on preliminary issues, whether evidence  
16 is admissible or not, whether, you know, procedures have  
17 been complied with and so on, and I'm not requiring the  
18 strict disclosure of witnesses on those kind of  
19 preliminary issues. So the objection would be overruled.  
20 You may continue, Mr. Gowey.

21 DIRECT EXAMINATION

22 BY MR. GOWEY:

23 Q. I think I was just about to ask you if you'd  
24 state your name and spell your last name, please.

25 A. Okay. My name is Jeremy Johnston, last name is

1 spelled J-o-h-n-s-t-o-n.

2 Q. And how are you employed, sir?

3 A. I'm employed as a forensic scientist with the  
4 Idaho State Police Forensic Laboratory here in  
5 Coeur d'Alene, Idaho.

6 Q. And how long have you held that position?

7 A. I've been with the Idaho State Police since July  
8 18<sup>th</sup> of 2003.

9 Q. Do you have any special training or prior  
10 experience to qualify for that position?

11 A. I've got a bachelor of science degree from Lewis  
12 and Clark College in Portland, Oregon. I've got a  
13 master's degree from Virginia Commonwealth University in  
14 Richmond, Virginia. I've graduated from the Virginia  
15 Institute of Forensic Science and Medicine, also in  
16 Richmond, Virginia. I've done three years of medical  
17 research at Oregon Health Sciences University, and I've  
18 recently become certified nationally with the Forensic  
19 Toxicology Certification Board in the area of alcohol  
20 expertise.

21 Q. And are you familiar with the standard operating  
22 procedures for breath alcohol testing just in the state  
23 of Idaho?

24 A. Yes, I am.

25 Q. And what's the nature of your familiarity with

1 that?

2 A. I wrote them.

3 Q. Okay. Have you testified with regard to those  
4 procedures in a court in Idaho prior?

5 A. Yes, I have, many times.

6 Q. And have you been qualified as an expert in  
7 testifying in those prior occasions?

8 A. Yes, I have.

9 Q. You've seen a copy of the motion in limine that  
10 was filed in this matter?

11 A. Yes, I have.

12 Q. Essentially, as I understand the argument, it's  
13 basically the -- There have been changes made to standard  
14 operating procedures to the point that there really are  
15 no standards any longer seems to be the argument. Are  
16 you -- Have there been changes that have been made in  
17 light of some case law?

18 A. Yes, there have.

19 Q. And can -- Are you familiar with the reasons  
20 behind those changes?

21 A. Yes, I am.

22 Q. Can you tell the Court about those?

23 A. Can you point out a specific one?

24 Q. Certainly.

25 A. It's been changed several times.

1 Q. Certainly. I think in the argument that's set  
2 forth in the -- the brief or the motion the defense  
3 mentions that --

4 MS. MARSHALL: Your Honor --

5 MR. GOWEY: Go ahead.

6 MS. MARSHALL: Go ahead.

7 MR. GOWEY: All right.

8 Q. Um, in light of -- Let's see. Let me -- And I  
9 apologize to the Court. There was a Court interpretation  
10 that talked about mandatory language and that "should"  
11 was not --

12 MS. MARSHALL: Your Honor, I'm going to object.  
13 He's asking a conclusory legal question based upon the --  
14 a case law. And in this particular case he has  
15 Mr. Johnston here who's indicated that he wrote the  
16 original standard operating procedures and that's it, and  
17 I don't know how he's qualified at this point to testify  
18 about case law if that's what this -- if that's what the  
19 State is asking.

20 MR. GOWEY: I guess the question, if I recall, was  
21 if there were changes that he had written based on case  
22 law and I was just trying to --

23 THE COURT: And he said he did.

24 MR. GOWEY: And I was just trying to -- He asked for  
25 a specific reference. I was simply trying to refer to a

1 case that's (inaudible)...

2 THE COURT: Overruled. You may continue.

3 Q. If you understood the question, sir, you can go  
4 ahead and answer it.

5 A. Yes. If I understand the question correctly,  
6 there was a legal interpretation made with the definition  
7 of "should" versus the definition of "must." Must was  
8 defined as being, you know, absolutely necessary, and uh,  
9 the word should was defined as being recommended. In  
10 laboratory terms we use the terms should as best  
11 scientific practice but not a critical component to  
12 establish the reliability of the instrumental readings.

13 Q. So were there any changes made to the standard  
14 operating procedure in response to that court case that  
15 (inaudible)... talk about?

16 A. Yes, there were.

17 Q. And what were the changes?

18 A. One of the changes that was made was the  
19 15-minute observation period was changed from a must to a  
20 should because the 15-minute observation period relies on  
21 subjective evidence, uh, subjective in nature because  
22 it's the officer's observations uh, and that gets argued  
23 against the -- the uh, subject's point of view, whether  
24 or not the officer could have observed them properly for  
25 a 15-minute observation period. But that 15-minute



1 observation period is put in place solely for what's  
2 termed as mouth alcohol or external contamination to the  
3 breath pathway.

4 There are other safeguards for mouth alcohol written  
5 into the standard operating procedures.

6 MS. MARSHALL: Your Honor, I'm going to object as  
7 non-responsive.

8 THE COURT: Overruled.

9 A. There are other safeguards in the standard  
10 operating procedure that are critical to establishing the  
11 reliability of the instrumentation in the readings that  
12 it gives. Those safeguards are still listed as musts,  
13 but the 15-minute observation period was changed from a  
14 must to a should.

15 MS. MARSHALL: Your Honor, I'm gonna object as non-  
16 responsive at this point.

17 THE COURT: Overruled. The answer will stand.

18 Q. And what are those still must uh, provisions  
19 that are set out in the operating procedures?

20 A. Well, two of them -- two of them that stand out  
21 is uh, the instrumental readings between the first uh --  
22 the first breath sample and the second breath sample have  
23 to be within .020 of each other. That establishes an  
24 objective measurement of the lack of external  
25 contamination to those breath samples. And another one

1 that is still a must is that the instrument must be  
2 performance verified within 24 hours of a breath sample  
3 being taken for evidential purposes on the portable  
4 instruments. And for the Intoxilyzer 5000, that  
5 performance verification has to be done during the course  
6 of that breath sampling event. Those are still critical  
7 components to establish the reliability of those test  
8 results.

9 Q. So if those standards were not adhered to, what  
10 would be the validity or the reliability of the test  
11 results?

12 A. If -- If there wasn't an O2 correlation between  
13 the first and second sample or if the performance  
14 verifications were -- I guess the criteria was not met,  
15 uh, I wouldn't be able to establish that those results  
16 were reliable.

17 Q. Conversely, if in fact there wasn't more than a  
18 .02 difference between a first and second sample on the  
19 Intoxilyzer 5000 and there had been a test, a check done  
20 of the instrument at the time that the breath samples  
21 were taken, what would that indicate?

22 A. I'm sorry, could you restate the question?

23 Q. Sure. If in fact there was less than a .02  
24 difference and in fact there had been a check done at the  
25 time the -- the test was done that indicated that the

1 instrument was functioning properly, what would that  
2 indicate to you in terms of reliability?

3 MS. MARSHALL: I'm gonna object on a compound  
4 question.

5 THE COURT: Do you understand the question?

6 THE WITNESS: Yes, I do.

7 THE COURT: You may answer it. Overruled.

8 A. If both of those critical components were met  
9 during the course of an evidentiary breath test, then I  
10 would be able to establish whether or not those breath  
11 test results were accurate and reliable.

12 Q. So if I were to tell you that breath test  
13 results obtained in a particular case, the two samples  
14 were .175, .181, what would that indicate to you with  
15 regard to that factor?

16 A. Well, they're within the 020 correlation  
17 coefficient, which rules out mouth alcohol or external  
18 contamination to the breath pathway. It also rules out  
19 radio frequency interference as a contributing factor,  
20 and it also rules out uh, variability due to inconsistent  
21 sample delivery into the instrument. Uh, so those would  
22 be the conclusions that I would be able to draw based  
23 solely upon those two numbers being given to me.

24 Q. Okay. And is it true that the last changes to  
25 the standard operating procedures were made in January of

1 this year?

2 A. That's correct. I believe they were uh, done  
3 January 16<sup>th</sup>.

4 Q. Okay. Were you involved in making those  
5 changes?

6 A. Yes, I was.

7 Q. And what was your role? What was your  
8 involvement?

9 A. I was the one that made the changes. Uh, then  
10 basically I -- I make the changes to it, they go out for  
11 a scientific review, then they go out for a managerial  
12 review, and then they go out for a legal review prior to  
13 them coming back with suggestings, reworkings. They go  
14 through a extensive review process prior to being put  
15 into place uh, on January 16<sup>th</sup> of this year.

16 Q. Okay. And so the standards that went into  
17 effect at that time had gone through that review process.

18 A. Yes, they have.

19 Q. In your expert opinion are there still standards  
20 in the standard operating procedures that would assure  
21 reliability and the test results if they're followed?

22 A. Yes, there are, absolutely.

23 Q. Thank you, Mr. Johnston. I don't think I have  
24 any other questions at this point.

25 A. Thank you.

1 THE COURT: Ms. Marshall, did you have any questions  
2 for Mr. Johnston?

3 MS. MARSHALL: Just briefly, your Honor.

4 CROSS-EXAMINATION

5 BY MS. MARSHALL:

6 Q. Mr. Johnston, who are you um -- who's your  
7 employer?

8 A. Idaho State Police.

9 Q. Okay. Who is your um, immediate supervisor?

10 A. My immediate supervisor is Ann Nord.

11 Q. How long have you been with Idaho State Police?

12 A. I believe I -- the answer was since July 18<sup>th</sup> of  
13 2003.

14 Q. Okay. You indicated um, certain parts of the  
15 standard operating procedures where there's a "must"  
16 versus a "should," correct?

17 A. Correct.

18 Q. Is one of those musts with regards to expired  
19 solution?

20 A. I don't know if that's a must or a should for  
21 that specific provision in the standard operating  
22 procedures.

23 Q. When is -- You indicated that there's a must  
24 when you have instrumental readings, um, because they're  
25 an objective measurement, correct?

1           A. Correct, that was one of the things that I  
2 indicated.

3           Q. And then there's a performance verification  
4 that's also a must, correct?

5           A. Correct.

6           Q. And that performance verification is based upon  
7 um, test of certain solution, correct?

8           A. Correct.

9           Q. So if it's out of compliance, if the solution  
10 that's used is expired and it's out of compliance with  
11 the must of the performance verified, then it would be  
12 inadmissible at that point, correct?

13          A. That depends. If -- If it was -- If the  
14 performance verification was outside of the  
15 specifications for that performance verification, then  
16 that would not establish the reliability of the evidence.  
17 If --

18          Q. When you say that it's not reliable, does that  
19 mean that it shouldn't be used in a court proceeding?

20          A. If it was outside of the performance  
21 verification specifications I wouldn't be able to  
22 establish whether or not that breath test result was  
23 reliable.

24          Q. You indicated that these changes, the most  
25 recent changes, were made on January 16<sup>th</sup>, correct?

1 A. Uh, correct. I believe so.

2 Q. And you wrote those changes?

3 A. I did.

4 Q. And you indicated there was a review process.

5 A. There was.

6 Q. Are you familiar with IDAPA, as it's called?

7 A. Uh, yes, I am.

8 Q. And in order to get a particular statute or rule

9 promulgated, are you aware of the proper procedures under

10 IDAPA?

11 A. Are you referring to if you wanna make a change

12 to IDAPA?

13 Q. That's correct.

14 A. I'm not particularly aware of uh, all of the

15 rules or all of the provisions with making changes to

16 IDAPA. I think Idaho State Police has only made one

17 change to IDAPA that I can remember, and that was with

18 regards to the language pertaining to the amount of the

19 sodium fluoride present in the blood collection tubes,

20 that the end concentration had to be at least 10

21 milligrams per milliliter final concentration.

22 Q. In order to get one of those changes made you

23 have to have a series of public review, is that correct?

24 A. For IDAPA changes? I believe so, yes.

25 Q. Okay.

1 A. I'm not familiar with the entire process though.

2 Q. Can you -- Um, you are familiar with the  
3 Intoxilyzer 5000 Manual, as it's referred to, correct?

4 A. Correct.

5 Q. What is that?

6 A. Uh, the Intoxilyzer 5000 Manual is basically a  
7 user manual uh, that's used as a -- almost like an  
8 educational reference for the officers so they can uh,  
9 refresh their memory uh, as to certain things that they  
10 have learned in their training.

11 Q. Who writes that particular manual?

12 A. The Intoxilyzer User Manual?

13 Q. Yes.

14 A. I -- I don't know who wrote that originally.

15 Q. Are you aware of whether those two -- whether  
16 the Intoxilyzer 5000 Manual and the standard operating  
17 procedures are in conflict with one another?

18 A. Uh, I don't know if they're in conflict with one  
19 -- with one another, but I did establish the standard  
20 operating procedures as the binding -- I guess the  
21 binding authority for establishing the validity of a  
22 breath test sample.

23 Q. You established that yourself?

24 A. Uh, I had -- I made a change to the uh -- I  
25 believe I -- I added a -- a paragraph or a uh, prolog to



1 the manuals stating that the standard operating procedure  
2 was the -- the guideline that Idaho State Police follows  
3 and promulgates for the rules of breath testing and that  
4 the user manuals were just a -- a educational reference  
5 that the officers could use.

6 Q. Okay. And again you're a forensic expert?

7 A. Uh, yes, I am. That's for the Court to decide  
8 though.

9 Q. But you're not -- All right.

10 MS. MARSHALL: I don't have anything further, your  
11 Honor.

12 THE COURT: Mr. Gowey?

13 REDIRECT EXAMINATION

14 BY MR. GOWEY:

15 Q. So how would you -- how would you characterize  
16 these -- these manuals that you've been -- that  
17 Ms. Marshall had asked you about. Uh, I understand  
18 you've talked about the language that was put in there as  
19 kind of a preamble to them or explanatory note about  
20 (inaudible)..., but how do you regard them as related to  
21 the SOPs?

22 A. Uh, they're more of like a educational tool.  
23 The officers, if they need to know what -- what a  
24 specific code or message from the instrument means, they  
25 can go to those reference manuals and look it up and see

1 that, okay, well, when it says interfere and detect, this  
2 is actually what the instrument is doing at that. But  
3 the rules binding what they need to do uh, I guess in  
4 order to establish in evidentiary breath samples, those  
5 are promulgated in the standard operating procedure and  
6 not in the user manuals. The user manuals, in essence,  
7 are kind of like a -- a uh -- just that. They're a  
8 manual to tell you how to use the instrument, how you can  
9 use the instrument.

10 Q. How do -- How do the SOPs differ in what they  
11 do?

12 A. Well, the standard operating procedures are the  
13 rules that you have to follow in order to establish the  
14 scientific validity of a evidentiary breath sample. The  
15 Intoxilyzer or Lifeloc User Manual just shows you, you  
16 know, if you need to know how to turn on the instrument,  
17 it'll show you how to turn on the instrument. It'll show  
18 you, you know, if you need to hit the reset button, it'll  
19 indicate where that reset button is. There's instrument  
20 diagrams in there that kind of show you the inner  
21 workings of the -- the infrared pathway. It's more of  
22 like a -- more of an educational tool and not necessarily  
23 a set of rules or guidelines for the acquisition of  
24 evidentiary breath samples.

25 Q. Okay. I think that's all I have. Thank you.

1 THE COURT: Ms. Marshall, any other questions?  
2 MS. MARSHALL: No, your Honor.  
3 THE COURT: All right. You may step down,  
4 Mr. Johnston.  
5 THE WITNESS: Okay. Thank you.  
6 THE COURT: May he be excused at this time?  
7 MR. GOWEY: Yes, your Honor.  
8 THE COURT: Any objection?  
9 MS. MARSHALL: No objection.  
10 THE COURT: You are excused. Thank you.  
11 MR. GOWEY: And that's all the evidence the State  
12 had, your Honor.  
13 THE COURT: And Mr. Govey, I'm sorry what --  
14 MR. GOWEY: No, that's all the evidence the State  
15 was going to present, your Honor.  
16 THE COURT: Okay. And Ms. Marshall, did you have  
17 any other testimony or evidence?  
18 MS. MARSHALL: Your Honor, the only thing I'd ask  
19 the Court to do, as has been recently submitted, is to  
20 take judicial notice of the files that were submitted,  
21 which is the standard operating procedures manual that  
22 was previously testified to just a minute ago and the  
23 manual of the Intoxilyzer 5000. Both of those things  
24 have been previously submitted by Mr. Logsdon dated  
25 May 6<sup>th</sup> of 2013.

1 THE COURT: Any objection to the request to take  
2 judicial notice?

3 MR. GOWEY: No objection, your Honor.

4 THE COURT: Okay. The Court will do so. Um, all  
5 right. So I've gotten all of the testimony, all of the  
6 exhibits, and I've got some items to take judicial notice  
7 of. I have not read all of that information. I need to  
8 do so. Is the preference to give me the opportunity to  
9 do that and have you come back and do closing arguments  
10 then or did you wanna do the closing now? I think we're  
11 gonna have to vacate the trial and reset it. I just  
12 don't have the time to get all of this stuff done in the  
13 short period that was given to me. Any preference,  
14 Mr. Gowey?

15 MS. MARSHALL: I think --

16 MR. GOWEY: I'll defer to counsel, your Honor.

17 MS. MARSHALL: Um --

18 THE COURT: Ms. Marshall, any --

19 MS. MARSHALL: -- if the Court would allow, I would  
20 prefer to come back for closing. Mr. Logsdon can make a  
21 closing argument.

22 THE COURT: That might be the best -- best approach  
23 on that then. Okay. What we're gonna have to do is um,  
24 since I've got a bunch of material here to review and  
25 compare with the testimony that I have, I'm going to have

1 to vacate the trial on this matter for this week. We'll  
2 reset the pretrial and trial, and then between now and  
3 the pretrial date I'll get a date for you to come back  
4 and have the closing arguments and put a decision on the  
5 record. Does that sound okay with everybody?

6 MR. GOWEY: Sure.

7 THE COURT: So Nancy, what new pretrial and trial  
8 dates do we have for this one?

9 THE CLERK: The 21<sup>st</sup> of June at 1:00.

10 THE COURT: June 21<sup>st</sup> at 1:00 would be the pretrial,  
11 so --

12 THE CLERK: July 1<sup>st</sup>.

13 THE COURT: And July 1 at 8:30 would be the status  
14 call. So between now and that pretrial date we'll have  
15 you -- have you back in. Uh, should be able to get an  
16 opportunity to review everything.

17 So, Mr. Riendeau, stay in good contact with your  
18 attorney. We'll get you the new notice of hearing on  
19 that and then um -- Any other questions in the meantime?

20 MR. RIENDEAU: (inaudible)...

21 THE COURT: Okay. You are excused when you get  
22 that. So I'll need that file back later on.

23 MR. GOWEY: Thank you.

24 (Proceedings concluded)

25

1 (Motion Hearing held on May 24, 2013)

2 THE COURT: We are on the record in Case No.  
3 CR 13-5363, State versus Jesse Carl Riendeau. Mr. Gowey  
4 and Mr. Logsdon are here; Mr. Riendeau is not. I'm not  
5 sure that he's required to be here, so it's just  
6 basically a -- some legal argument and the Court's  
7 entering a decision. So I've uh, finally now had the  
8 full opportunity to um, review everything in this case,  
9 including the um, videos. And I must say the quality on  
10 those is -- was -- is -- is excellent on -- on those  
11 videos. So what would Mr. Logsdon like to tell me about  
12 his various motions?

13 MR. LOGSDON: Your Honor, I believe the only things  
14 that are on for today are the motion to suppress as to  
15 the stop and the extension of the stop and then the  
16 motion in limine as to the um, standard operating  
17 procedures of the Idaho State Police.

18 In terms of the motion to suppress, we're asking  
19 that the Court make inter-findings that the video did not  
20 bear out the claims that the State had made. That even  
21 if the officer saw him supposedly go one or two seconds  
22 into a bike lane, that that would not have been a proper  
23 reason for a stop; that a stop did occur; when the  
24 officer was speaking to the -- to my client on his lawn  
25 and my client had attempted to basically break off the

1 communication, the officer made it quite clear that he --  
2 with his tone and with the statements that he made that  
3 it was not going to be a um, sort of friendly  
4 conversation, that he was in fact seized; um, that there  
5 wasn't any real reasonable, articulable suspicion for the  
6 officer to start to suspect that a DUI had taken place,  
7 that is, my client never admitted to drinking; the  
8 officer didn't state that he thought that he smelled like  
9 anything, or basically um, there was no real reason for  
10 the officer to have turned it into a DUI situation.

11 And then as far as the motion in limine goes, we're  
12 asking that the Court find uh -- I don't know if this  
13 happened or not, but hopefully the Court took notice of  
14 the SOPs and the manual at the last hearing, uh, but  
15 we're asking you to find that there is no method, and  
16 that the method is required by the statute and without  
17 the method the breath test results can't come in. That  
18 method is lacking either because the standard operating  
19 procedures are not being promulgated as required under  
20 the Idaho Administrative Procedures Act or that at this  
21 point uh, the mandatory provisions of them have been gone  
22 away to the point that we've reached what Judge Lansing  
23 had warned, which is where there are no real mandatory  
24 standards there is no standard and you can't say that  
25 it's providing um, the necessary accuracy to enter uh,

1 these various -- or the test results. And so for either  
2 one of those reasons we would say that a method is  
3 lacking, and because there is no method, the breath test  
4 results should be excluded. Thank you.

5 THE COURT: Mr. Gowey. \*\*11:16:47\*\*

6 MR. GOWEY: Thank you, your Honor. I didn't do the  
7 -- the motion to suppress hearing. I think Mr. Judd was  
8 here for that. But my understanding from his notes and  
9 from my knowledge of what's in the report and in the  
10 videos is that certainly the officer had a basis to make  
11 the stop. Um, there is a municipal ordinance, the City  
12 of Coeur d'Alene has an ordinance, it's 10.40.010, that  
13 prohibits driving in various places, including bike lanes  
14 specifically mentioned, and so I would argue that this  
15 would have been a violation of that. I think it's also  
16 -- under State Code would constitute a failure to  
17 maintain a lane pursuant to 49-637 of the Idaho Code. I  
18 suppose arguably it might be indicia of inattentive  
19 driving under State Code 49-1401 sub 3 or (inaudible)...  
20 careless driving, which is 10 38 010. Um, but I think  
21 there was a basis for the stop.

22 Insofar as the extension of the contact, uh, I  
23 believe there was sufficient evidence that allowed the  
24 officer to initially detain the defendant based on the  
25 driving that he observed, and that once he did that there



1 was additional evidence that allowed him to extend the  
2 contact, and ultimately, certainly, there was evidence  
3 indicating uh, the defendant may have been driving while  
4 impaired and gave the officer an opportunity to -- to  
5 inquire further into that.

6 Um, specifically I guess, your Honor, uh -- And I  
7 was just checking the notes that Mr. Judd had made. I  
8 think there was evidence of some sluggish or lethargic  
9 movement, that there was some uh, glossiness to the  
10 defendant's eyes, and so there was -- even if there  
11 wasn't a distinct odor of an alcoholic beverage, there  
12 was at least some reason for the officer to investigate  
13 further, and I think that ultimately one thing led to  
14 another and did justify the continuation of the contact.

15 Um, there was eventually an admission to some  
16 alcohol consumption, and uh, then the officer  
17 administered standardized field sobriety tests and  
18 obviously the arrest ultimately occurred. So I think  
19 there was a basis for the initial stop and then a basis  
20 for continuation of the contact based on the totality of  
21 the things that the officer knew uh, initially and  
22 continued to process and learn as the contact continued.

23 With regard to the motion in limine, um, I  
24 understand there's I guess two bases for argument that  
25 there's no method and therefore the results are

1 inadmissible. First, that um, the rules weren't  
2 promulgated pursuant to IDAPA regulations. But my  
3 reading of the statute doesn't indicate that in fact  
4 there needs to be -- It says as adopted by the department  
5 uh, and it doesn't specify that it has to be pursuant to  
6 IDAPA. So I think if the department has -- I think  
7 Mr. Johnston testified at the hearing uh, earlier this  
8 week that if in fact it was adopted by the department  
9 then they follow the procedures that were allowed or  
10 permitted them to do pursuant to the statute.

11       Once they did that, the issue I guess becomes the  
12 second prong to Mr. Logsdon's argument that there's just  
13 not any standards any longer for the uh -- to be able to  
14 follow. But again I think Mr. Johnston addressed that.  
15 Obviously the Court's had the ability to review the  
16 documents that you did take notice of at the hearing.  
17 And uh, there certainly are some things I think --  
18 Mr. Johnston talked about "shoulds" being best practice,  
19 and there are some things that talk about should. He  
20 also talked about some things still being "musts." Those  
21 are mandatory things. And those are the things that must  
22 be followed. And so I think there are certainly some  
23 standards that are still there. He used an example to  
24 distinguish between the two situations. I believe he  
25 said that with regard to the observation period the

1 officer should closely observe the person for 15 minutes,  
2 make sure they don't burp or otherwise introduce  
3 something into the mouth during that time, and he said  
4 that was kind of a subjective standard, that in fact  
5 sometimes um, the officer will say, you know, a person  
6 didn't burp and the subject says, Oh, I did burp, you  
7 just didn't hear me, and it really does come down to  
8 subjective observation, whereas some of the other  
9 standards that are musts, such as in order to have a  
10 valid breath test with the Intoxilyzer 5000 as was used  
11 here, there needs to be two samples taken and they have  
12 to be within .02 of each other. Uh, that is evidence,  
13 scientific objective evidence that there wasn't any  
14 interferent, there wasn't anything in the mouth that was  
15 being read because that's the purpose of having the two  
16 samples and if they're within that range then the  
17 reliability is established by that and it's more of an  
18 objective standard; that's why that's a must.

19       Anyway, your Honor, I know you've spent lots of time  
20 reading the material and hearing the evidence at a couple  
21 different hearings in this matter so I won't belabor it.  
22 Uh, but I think that's essentially the State's position  
23 with regard to the two motions. Thank you.

24       THE COURT: Okay. I did have a question for  
25 Mr. Logsdon. In your motion in limine on page 1, the one

1 that was filed May 6<sup>th</sup>, you indicate there that um -- you  
2 talk about the training and operations manual for the  
3 various breath testing devices including the Lifeloc  
4 device used in this case.

5 MR. LOGSDON: Did I do that, your Honor?

6 THE COURT: Is that a typo or --

7 MR. LOGSDON: That is a typo, your Honor. I'm  
8 sorry.

9 THE COURT: -- a misprint? Because I thought that  
10 the test results and all of the equipment on this one was  
11 related to the Intoxilyzer 5000.

12 MR. LOGSDON: That is correct, your Honor, and I  
13 apologize that that is in there. That should say  
14 Intoxilyzer 5000.

15 THE COURT: Okay. That's what I thought. I thought  
16 that was an error in there and I just wanted to double  
17 check on that. Any -- Any other comments, Mr. Logsdon?

18 MR. LOGSDON: I -- If I -- If I might just briefly.  
19 I know the State (inaudible)... to try to rely in part on  
20 city ordinances. It's my understanding that those city  
21 ordinances are required to be proven by statute, that  
22 municipal courts do not have to require that. They can  
23 take judicial notice that this is not a municipal court  
24 and therefore those ordinances would have needed to have  
25 been proven in order to be relied upon for the Court to

1 make a determination in this case.

2       And then as for the motion in limine, I think that  
3 the Idaho State Police do not have a very good track  
4 record in terms of keeping up their standard operating  
5 procedures. I think this particular argument that it's  
6 subjective whether or not a person burped is -- is weird.  
7 Essentially the question should be whether or not a burp  
8 can affect the outcome and that this 15-minute procedure  
9 should be mandatory, that the officer should be paying  
10 attention and -- and I don't really understanding the  
11 Idaho State Police's response that, well, it might have  
12 happened anyway and so it doesn't -- they don't need to  
13 watch. I don't really understand the flow of that  
14 particular argument. I think just overall you just have  
15 a -- a pattern of taking away these issues after Courts  
16 have found that these are things that need to get done in  
17 order to know that the breath test result was accurate,  
18 and ISP has come back again and again and removed that as  
19 being something that the officer necessarily had to do.  
20 And that just -- That pattern I think should cause  
21 everyone a lot of concern and it could easily be remedied  
22 either with um, them actually doing things under IDAPA or  
23 um, well, not continuously watering it down as they have  
24 been doing. Thank you.

25       THE COURT: Thank you. well, I wanna thank counsel

1 for doin' a good job in presenting the issues in this  
2 matter. Mr. Logsdon has certainly done a yeoman's job as  
3 far as uh, bringing issues up here and bringing them to  
4 the attention of the Court. And, you know, extensive  
5 briefing has been done on that, which we don't very often  
6 get at the magistrate's division, so um, did an excellent  
7 job on this.

8 I made some um, preliminary findings on May 10<sup>th</sup> when  
9 we had some testimony presented by Officer Rios. My  
10 preliminary findings were um, not changed at all by my  
11 viewing of the three different videos, the VIEVU one, the  
12 one in the car that the officer had, and the one at the  
13 jail. So the findings would still stand in that regard.

14 So starting with the issue of the stop and the  
15 contact that Officer Rios conducted and his contact with  
16 Mr. Riendeau, again I do find that Officer Rios was on  
17 duty on the 31<sup>st</sup> of March of this year at about 1:00 a.m.,  
18 and he was westbound on Harrison Avenue here in Coeur  
19 d'Alene, Kootenai County, state of Idaho.

20 while he was on Harrison Avenue he saw a vehicle  
21 approaching him that was all the way on the right-hand  
22 side of the, you know, paved portion of the road there  
23 over into the bike lane. And you can visibly see that on  
24 the video that was marked Plaintiff's 2, the video that  
25 was the car operated video. You can -- You can see this

1 vehicle going by on the left and it's way over to the  
2 right-hand side of that -- of that roadway over near the  
3 curb. The officer then turned around and um, was going to  
4 pursue the vehicle.

5 Let me look down in my notes here. Hang on just a  
6 second. Now, the officer said that uh, the vehicle was a  
7 couple of seconds over -- over that line for a distance  
8 of about 50 feet. The vehicle that Officer Rios uh, um,  
9 turned around and started to follow then went southbound  
10 on 10<sup>th</sup>, so the vehicle turned right on 10<sup>th</sup> Street. Um,  
11 and I thought it was pertinent to note that Officer Rios  
12 did not activate his -- his uh -- his lights, the blue  
13 lights and the siren. None of that was -- was put on.  
14 The officer just kind of followed over, and uh, when he  
15 got onto 10<sup>th</sup> Street he noticed that the driver had  
16 stopped and the driver was getting out of the vehicle and  
17 the driver turned out to be Mr. Riendeau.

18 The car was not blocked in any way -- So we don't  
19 have an actual stop in the -- in the normal sense where  
20 an officer pulls somebody over on the road. So as  
21 Officer Rios testified, he saw the driver stepping out of  
22 the car. He approached and um, then -- then Mr. Riendeau  
23 um, was kind of walking towards him, looked like he had  
24 some sort of a bag of food or something with him. The  
25 officer told Mr. Riendeau why he was contacting him, told

1 him about the uh, perceived violation on uh, Harrison,  
2 and noticed that Mr. Riendeau's reactions were somewhat  
3 slow, his speech was somewhat slurred, he had some clumsy  
4 actions, and he asked Mr. Riendeau if he had drank any  
5 alcohol and Mr. Riendeau said no. He asked if he had  
6 ingested any drugs or prescription or whatever and he  
7 said no.

8 Now, the officer also indicated at some point that  
9 it was kind of windy out, and you can actually hear the  
10 wind from time to time in the video. Initially he didn't  
11 -- the officer didn't smell any alcohol on Mr. Riendeau  
12 at first due to the wind, but then when -- when he got a  
13 little bit closer to him then he -- then he was able to  
14 smell some -- some alcohol on him. But um, even though  
15 Mr. Riendeau said he didn't -- hadn't had anything to  
16 drink and wasn't usin' any drugs or prescriptions or  
17 anything like that, uh, due to the slow reactions, the  
18 speech pattern, the clumsy reactions and so on, the  
19 officer requested that Mr. Riendeau do some tests. Uh,  
20 went through the HGN test, the walk-and-turn test, and  
21 the one-leg stand.

22 And I do find under the circumstances of this case  
23 here that the officer did have a reasonable articulable  
24 suspicion to believe that Mr. Riendeau was operating the  
25 vehicle contrary to law and might -- might be impaired or



1 have some -- some issue there that would justify the  
2 further investigation and the further contact. So I  
3 would not be suppressing the evidence based on any  
4 illegal uh, stop or prolonged contact.

5 During the HGN testing um, the officer indicated  
6 that uh, there was um, lack of smooth pursuit, um,  
7 nystagmus on maximum deviation, onset prior to 45  
8 degrees, so he indicated that there was six points  
9 considering both eyes, which is an indication of  
10 impairment.

11 On the walk-and-turn test um -- Now, obviously on  
12 the HGN you really can't see all of this stuff on a  
13 video. You know, the officer's testimony is the evidence  
14 we have there.

15 Now the walk-and-turn test is -- you know, you can  
16 get some indication on the video that there was an  
17 instructional phase and then an activity phase where the  
18 person is actually doing it. And the officer testified  
19 that uh, Mr. Riendeau had lost his balance. He gave him  
20 a point for that. Um, there was some attempts um,  
21 relative to the walking and turning, but there were six  
22 points given on that. And you can kind of tell uh, from  
23 the video that Mr. Riendeau was having some difficulties  
24 with that one and I would -- it seems -- the video does  
25 seem to support the officer's indication that

1 Mr. Riendeau did not pass that test.

2 One-leg stand, um, the testimony was that  
3 Mr. Riendeau attempted to perform that, uh, but was  
4 swaying, raised his arms, put his foot down. He gave him  
5 three points on that, and that seems to be born out by  
6 the video as well.

7 So he was placed into custody, transported to the  
8 Public Safety facility, which I feel that the officer did  
9 have probable cause to do that. Uh, went through the  
10 booking process there. Um, and we had the video there  
11 from the jail, which was Plaintiff's Exhibit 1, and you  
12 can see the officer checking Mr. Riendeau's mouth. And  
13 just a side note, Mr. Riendeau seemed to be pretty  
14 cooperative throughout everything. He was very talkative  
15 and gregarious about the whole thing and asking lots of  
16 questions and seemed to be in a pretty good mood.  
17 Initially, at his residence, he was trying to talk the  
18 police officer out of giving him a ticket or doing  
19 anything because he was at home.

20 But uh, nevertheless, the officer did go through the  
21 prebooking process, examined his mouth for any foreign  
22 substances. Everything was clear there. He talked about  
23 what time the um, observation was starting. He  
24 instructed Mr. Riendeau not to burp, belch or vomit, and  
25 you can see that on the video.

1 I find that the officer's testimony that he -- that  
2 he followed the 15-minute observation period is correct.  
3 Uh, before having him undertake the first breath test he  
4 reviewed the advisory form, which has been admitted into  
5 evidence as Defendant's Exhibit A. Mr. Riendeau seemed  
6 to understand that information and was perfectly willing  
7 to take the test.

8 I do not find that there is any coercion of  
9 Mr. Riendeau to take the test. He did so voluntarily. I  
10 don't find that, you know, indicating to somebody that if  
11 they don't take the test their license is going to be  
12 suspended or a civil penalty will be imposed or anything,  
13 I don't find that that is, you know, coercion. I find  
14 that when -- when you sign up for driving privileges in  
15 the state of Idaho you indicate that you're gonna be  
16 willin' to do that, the implied consent statute, and --  
17 and uh, I find -- I don't find any coercion under the  
18 suspension advisory that uh, you know, if you don't take  
19 it, later you change your mind you're not gonna take it,  
20 then there's gonna be some sanctions involved in there.  
21 But uh, he decided to take the test and he was  
22 cooperative and I don't find anything improper there. So  
23 the motion in limine regarding any alleged coercion on  
24 the breath test would be denied.

25 It didn't appear that Mr. Riendeau had any questions

1 about the ALS Advisory Form. That was all on the uh,  
2 VIEVU video at that time. In fact Mr. Riendeau was  
3 asking about the -- the video and he thought that that  
4 was kind of cool.

5 Um, on the breath testing of the Intoxilyzer 5000,  
6 the officer talked about the calibration checks, the self  
7 clear, the purging, the air blanks and so on, kind of  
8 explained everything to Mr. Riendeau. The officer  
9 indicated that the solution checks, the .08 and .20 were  
10 all uh, done correctly and all accurate. You can see on  
11 the video that Mr. Riendeau was blowing into the tube,  
12 um, and there was some issues with him blowing into it at  
13 first because he was -- it sounded like he didn't have  
14 his mouth completely around the tube and air was going  
15 out and you could hear the tone was -- was not a solid  
16 tone the whole time. But finally he was able to get a  
17 solid tone, a good breath for the necessary period of  
18 time. And the test results .17, .18 um, were measured on  
19 the device and so at that point in time Mr. Riendeau was  
20 formally charged with the DUI charge.

21 Relative -- Let me see if there's any other notes  
22 that I took on the videos here that are of pertinence  
23 here. Oh, on Plaintiff's No. 3 that was admitted into  
24 evidence, it was -- Initially Mr. Riendeau indicated that  
25 he had nothing to drink. But then he changed his story

1 after a bit and said that he did drink some Dos Equis at  
2 the Toro Viejo with some friends earlier in the evening.  
3 I think he said it was about 7:30 p.m.

4 My observation of the Plaintiff's 3 indicated that  
5 Mr. Riendeau seemed to have some trouble following  
6 instructions on some of the field sobriety evaluations.  
7 He kept talking and wasn't listening while the officer  
8 was explaining things to him. Some aspects of the video  
9 were -- were -- they were kind of dark unless the officer  
10 was actually shining a light at Mr. Riendeau.

11 On Plaintiff's 2, the video taken from the car  
12 angle, um, in addition to what I already said about you  
13 can see the vehicle go by and it was way over to the side  
14 of the road near the curb over the bike lane, um, further  
15 on in that -- that particular video um, you can hear  
16 Mr. Riendeau's initial comment that he didn't have  
17 anything to drink. He said he had gone to dinner  
18 earlier. But on one of the balance tests you can clearly  
19 see that he is -- he was havin' problems with his  
20 balance.

21 And then the jail video, Plaintiff's 1, it appears  
22 to me that the officer waited -- you know, checked his  
23 mouth, waited the full 15 minutes before doin' the test  
24 administrations. And -- And on that video the first test  
25 results were indicated as .175, the second one was .181.

1 And the officer talked about the first offense, what the  
2 bond would be and so on, and even showed Mr. Riendeau  
3 what the test results were there.

4 Now, um, on the aspect of the -- you know the  
5 manuals and the standard operating procedures and so on,  
6 um, we had some testimony from Mr. Johnston, the forensic  
7 scientist with the Idaho State Patrol here in the  
8 Coeur d'Alene lab. He's been in that capacity since  
9 2003. He talked about his background and training, his  
10 educational degrees and so on. Said he's familiar with  
11 the standard operating procedures regarding the breath  
12 testing. In fact, uh, Mr. Johnston was the individual  
13 who wrote them. He's testified on -- on them in other  
14 cases.

15 He did indicate that some changes have been made in  
16 light of case law as that -- as that develops. He talked  
17 about differences in uh, how they um, interpret the word  
18 "should," that would be something that would be  
19 recommended, uh, or "must," that is something that is  
20 necessary. He talked about a change relative to the  
21 15-minute observation period for mouth alcohol. He  
22 indicated that that is now a should; therefore it's a  
23 recommended. Um, the musts relative to the testing are  
24 that they -- between the first and second readings the  
25 readings need to be within a .020. Another must is that

1 the instrument must be performance verified.

2 He's reviewed the test results in this case and feel  
3 that -- he feels uh -- he gave his expert opinion that  
4 the results here are within all acceptable variances.  
5 Talked about a January 16<sup>th</sup> change to the standard  
6 operating procedures after reviewing the process, feels  
7 that the standard operating procedures uh, that are in  
8 effect at this time assure reliability.

9 He's familiar with the IDAPA regulations. He's  
10 familiar with the Intox 5000 User Manual, and he  
11 indicates that in his opinion the user manuals are an  
12 educational reference for the officers. It's the -- It's  
13 the SOPs that are the rules to follow for establishing  
14 the scientific validity of the instrument.

15 Now, I did note that in one of the cases that  
16 Mr. Logsdon cited there was a variance between the  
17 manuals and the SOPs. One was more detailed and  
18 particular than the other, and the ruling essentially was  
19 that you have to go -- you have to follow the more  
20 particular one, the more detailed one, and I agree with  
21 that. But I'm not seeing anything in what I've reviewed  
22 here to indicate that, you know, the Idaho State Patrol  
23 and the department are just, you know, waiving all of the  
24 requirements and -- and -- such that would make the  
25 testing or the device that was used here, the Intox 5000,

1 unreliable. I'm -- I'm finding that the officer followed  
2 all of the requirements to the T and that the standard  
3 operating procedures that are in effect are legitimate  
4 and make sure that the device is working properly and  
5 assure us the scientific validity of the instrument and I  
6 would deny the motion to suppress the breath test results  
7 on the basis as raised in Mr. Logsdon's motions here.

8 So the breath test results will be admissible  
9 assuming that um, you know, the proper foundation is laid  
10 at trial. I'm not finding that the stop or the continued  
11 contact with the defendant should be -- you know,  
12 anything should be suppressed relative to that. And I'm  
13 finding that the taking of the breath test by  
14 Mr. Riendeau was voluntary, consensual, and the consent  
15 is not vitiated by the suspension advisory information.

16 So, Mr. Govey, if you could prepare an order  
17 consistent with that I will sign that. And when is this  
18 set for trial?

19 MR. GOWEY: 21<sup>st</sup>.

20 THE COURT: So we've got a pretrial conference June  
21 21 at 1:00 and the jury status call is July 1 at 8:30.  
22 Does that sound right?

23 MR. LOGSDON: That is correct, your Honor.

24 THE COURT: Okay. Any other questions?

25 MR. LOGSDON: Your Honor, I just have a quick



1 question.

2 THE COURT: Sure.

3 MR. LOGSDON: That was a very detailed finding and I  
4 thank your Honor for putting that much time into it. I  
5 just wanna pinpoint when did your Honor find that  
6 Mr. Riendeau was not free to leave? When was he seized?  
7 At what point?

8 THE COURT: It -- It didn't appear to me that he was  
9 um, free to leave at the -- at the point where the  
10 officer was -- was havin' him take the uh -- the -- the  
11 -- you know, the HGN and those kinds of things. And um,  
12 but I did feel that he had a reasonable, articulable  
13 suspicion um, at -- at that point. Not probable cause,  
14 but he had a reasonable, articulable suspicion to  
15 continue the contact. But once he starts, you know,  
16 doin' the HGN and the walk and turn and those kind of  
17 things, I don't -- I didn't find that he was really free  
18 to leave at that point.

19 MR. LOGSDON: Thank you, your Honor.

20 THE COURT: Okay. Any other questions?

21 MR. LOGSDON: No, your Honor.

22 THE COURT: Mr. Gowey, did you have any questions?

23 MR. GOWEY: I guess just to make -- for  
24 clarification sake, your Honor, I assume the order is  
25 just basically the Court's ruling, not all the particular

1 findings are --

2 THE COURT: Right. Yeah.

3 MR. GOWEY: Okay.

4 THE COURT: I -- We don't need all of the specifics  
5 in there. If uh -- If the matter is uh -- is at issue at  
6 some point, a transcript would need --

7 MR. GOWEY: Certainly.

8 THE COURT: -- to be made and then we'd go from  
9 there, but. Okay? All right. If you can maybe have  
10 that order available by the end of next week, that'd be  
11 great.

12 MR. GOWEY: I -- (off record)

13 (Proceedings concluded)

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1 STATE OF IDAHO :  
2 County of Kootenai : CERTIFICATE OF TRANSCRIBER

3  
4  
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6  
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8  
9 I, Gail McClelland, Transcriptionist for the County  
10 of Kootenai, State of Idaho, do hereby certify that I  
11 transcribed the foregoing proceedings from an electronic  
12 recording of said proceedings and that the above and  
13 foregoing transcript is a full, true and correct record  
14 of said proceedings.

15 Dated this 23<sup>rd</sup> day of September, 2013.

16  
17  
18 Gail McClelland  
19 Transcriptionist  
20  
21  
22  
23  
24  
25



# **Notice of Suspension for Failure of Evidentiary Testing** (Advisory for Sections 18-8002 and 18-8002A, Idaho Code)

DR# 13C07815

**Issued To:**

Last Name <u>Riendeau</u>		First <u>Jesse</u>	Middle <u>Carl</u>	Date of Birth [Redacted]	County of Arrest <u>Kootenai</u>	Date of Arrest <u>03/21/13</u>	Time of Arrest <u>0126</u>
Mailing Address <u>1138 N 10th St</u>					Driver's License Number <u>CL227852F</u>	State <u>ID</u>	License Class <u>D</u>
City <u>COA</u>		State <u>ID</u>	Zip <u>83814</u>	Citation # <u>C2501703</u>	Operating CMV? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Transporting Hazmat? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

## **Suspension Advisory**

- I have reasonable grounds to believe that you were driving or were in physical control of a motor vehicle while under the influence of alcohol, drugs, or other intoxicating substances. You are required by law to take one or more evidentiary test(s) to determine the concentration of alcohol or the presence of drugs or other intoxicating substances in your body. After submitting to the test(s) you may, when practical, at your own expense, have additional test(s) made by a person of your own choosing. You do not have the right to talk to a lawyer before taking any evidentiary test(s) to determine the alcohol concentration or presence of drugs or other intoxicating substances in your body.
- If you refuse to take or complete any of the offered tests pursuant to Section 18-8002, Idaho Code:
  - You are subject to a civil penalty of two hundred fifty dollars (\$250).
  - You have the right to submit a written request within seven (7) days to the Magistrate Court of Kootenai County for a hearing to show cause why you refused to submit to or complete evidentiary testing and why your driver's license should not be suspended.
  - If you do not request a hearing or do not prevail at the hearing, the court will sustain the civil penalty and your license will be suspended with absolutely no driving privileges for one (1) year if this is your first refusal; and two (2) years if this is your second refusal within ten (10) years.
- If you take and fail the evidentiary test(s) pursuant to Section 18-8002A, Idaho Code:
  - I will serve you with this **NOTICE OF SUSPENSION** that becomes effective thirty (30) days from the date of service on this notice suspending your driver's license or driving privileges. If this is your first failure of an evidentiary test within the last five (5) years, your driver's license or driving privileges will be suspended for ninety (90) days with absolutely no driving privileges of any kind during the first thirty (30) days. You may request restricted non-commercial driving privileges for the remaining sixty (60) days of the suspension. Restricted driving privileges will not allow you to operate a commercial motor vehicle. If this is not your first failure of an evidentiary test within the last five (5) years, your driver's license or driving privileges will be suspended for one (1) year with absolutely no driving privileges of any kind during that period.
  - You have the right to an administrative hearing on the suspension before the **Idaho Transportation Department** to show cause why you failed the evidentiary test and why your driver's license should not be suspended. The request must be made in writing and received by the department within seven (7) calendar days from the date of service on this **NOTICE OF SUSPENSION**. You also have the right to judicial review of the Hearing Officer's decision.
- If you are admitted to a problem solving court program and have served at least forty-five (45) days of an absolute suspension of driving privileges, you may be eligible for a restricted permit for the purpose of getting to and from work, school, or an alcohol treatment program.

**NOTICE OF SUSPENSION** If you have failed the evidentiary test(s), your driving privileges are hereby suspended per #3 above, commencing thirty (30) days from the date of service on this notice. If a blood or urine test was administered, the department may serve a **Notice of Suspension** upon receipt of the test results.

Date of Service: 03/21/13

*This Suspension for Failure or Refusal of the Evidentiary Test(s) is separate from any other Suspension ordered by the Court. Please refer to the back of this Suspension Notice for more information.*

Signature of Reporting Officer <u>[Signature]</u>	Print Name and I.D. Number of Reporting Officer <u>Marie Rios K22</u>	Agency Code <u>2802</u>	Telephone Number <u>769-2320</u>
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Department use only Failure: ☒ Breath ☐ Urine/Blood ☐ Refusal

White Copy - If failure - to ITD; If refusal - to Court

Yellow Copy - to Law Enforcement

Pink Copy - to Court

Goldenrod Copy - to

JESSE CARL RIENDEAU

41982

**ADMITTED IN EVIDENCE**

DATE 5-10-13 NA  
DEPUTY CLERK

**DEFENDANT'S EXHIBIT NO. A**  
IDENTIFICATION/EVIDENCE  
CASE NO. 2013-5363  
DATE: 5-10-13